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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 217

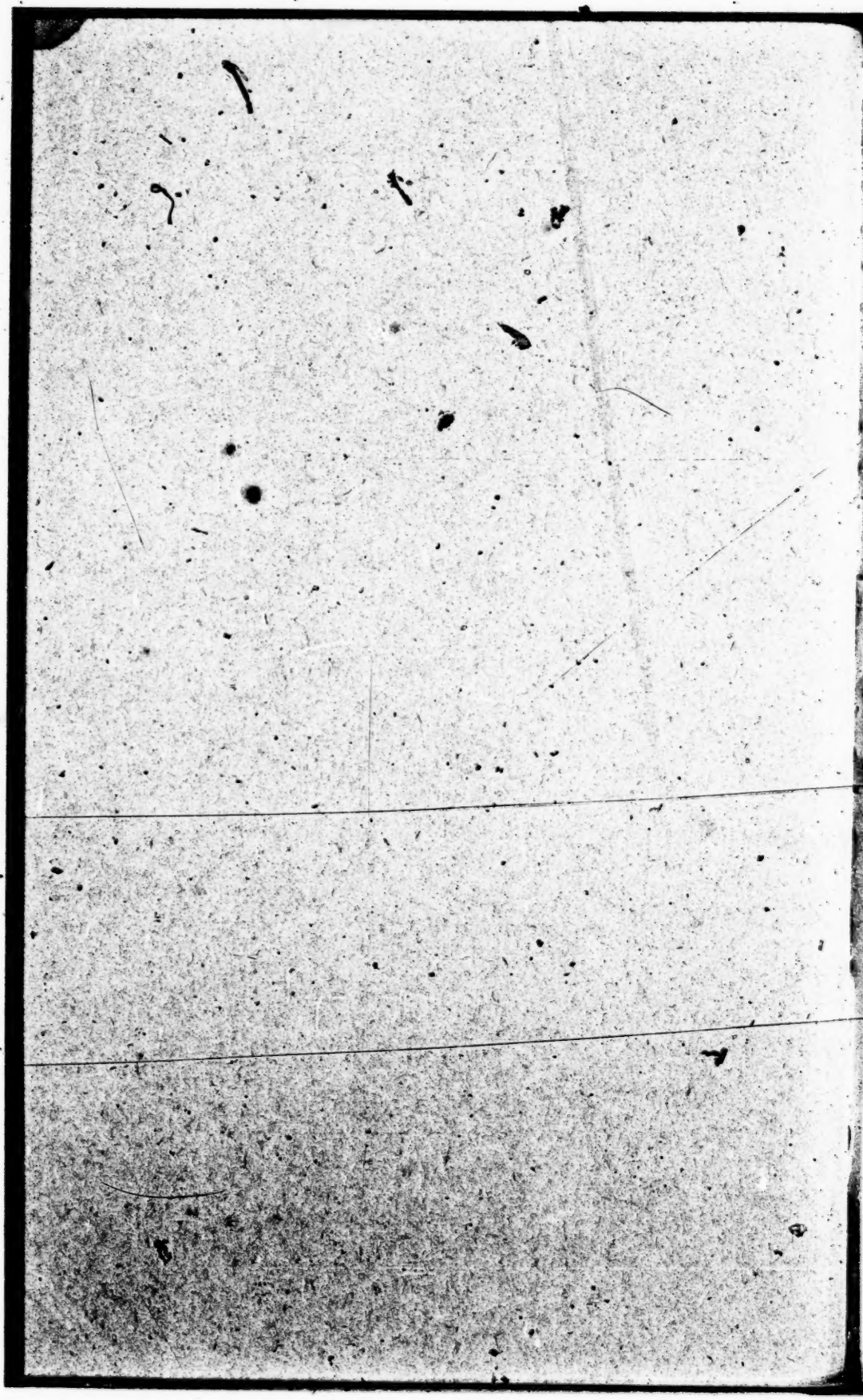
MIDLAND REALTY COMPANY, APPELLANT,

vs.

KANSAS CITY POWER AND LIGHT COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

FILED JULY 22, 1936.



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[fol. 1]

IN SUPREME COURT OF MISSOURI, DIVISION NO. 1

No. 33028

KANSAS CITY POWER & LIGHT COMPANY, Plaintiff-Appellant,

vs.

MIDLAND REALTY COMPANY, Defendant-Appellant

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed July 3, 1936

To the Clerk of the Supreme Court of Missouri:

Midland Realty Company, Appellant, hereby calls upon the Clerk of the Supreme Court of Missouri, to include in a transcript of the Record on Appeal of the above entitled cause, to be sent to the United States Supreme Court:

1. All record entries in this case in the Supreme Court of Missouri, including: (a) docketing case, (b) filing of opinion of the Court, (c) filing of Motion for Rehearing, (d) filing of modified opinion of the Court, (e) filing of Motion for Rehearing on modified opinion, (f) orders overruling first and second Motions for Rehearing, (g) order showing filing of and denial of motion to transfer to Court in banc, (h) copy of the judgment entered as of April 23, 1936, (i) the filing of petition for appeal and order of appeal to United States Supreme Court, (j) order showing the filing of and approval of appeal bond.

2. The final opinion of the Court herein.

3. The citation to appear in United States Supreme Court, and acknowledgment of service thereof.

4. The petition for appeal to United States Supreme Court.

[fol. 2] 5. Assignment of errors filed with petition for appeal.

6. Order allowing appeal to United States Supreme Court.

7. Notice of Appeal.

8. The portion of the printed Abstract of the Record in this Court, as is contained in a copy of said printed abstract accompanying this præcipe.

9. Clerk's certificate to the transcript of the record, as sent to the United States Supreme Court.

Scarritt, Jones & North, Elliott H. Jones, Attorneys for Appellant, Midland Realty Company.

Copy of foregoing Præcipe received this July 1st, 1936.

Ludwich Graves, Irvin Fane, Johnson, Lucas, Landon, Graves & Fane, Attorneys for Kansas City Power & Light Company, Appellee.

[File endorsement omitted.]

[fol. 3] IN SUPREME COURT OF MISSOURI

MINUTE ENTRY OF FILING OF JUDGMENT

Be it Remembered That, heretofore, to-wit, on the 12th day of January, 1933, there was filed in the office of the Clerk of the Supreme Court of the State of Missouri, in a cause between Kansas City Power & Light Company, a corporation, Plaintiff-Appellant, and Midland Realty Company, a corporation, Defendant-Appellant, No. 33,028, a certified copy of the judgment of the Circuit Court of Jackson County, and of the order of said circuit court granting an appeal from said judgment to the Supreme Court of the State of Missouri.

IN SUPREME COURT OF MISSOURI

[Title omitted]

MINUTE ENTRY OF SUBMISSION—September 11, 1935

Come now the parties, by their respective attorneys, and after arguments herein submit this cause to the Court.

[fol. 4] IN SUPREME COURT OF MISSOURI

KANSAS CITY POWER & LIGHT COMPANY, a Corporation, Plaintiff-Appellant,

vs.

MIDLAND REALTY COMPANY, a Corporation, Defendant-Appellant

Appeal from Circuit Court of Jackson County

JUDGMENT—January 11, 1936

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered, be reversed, annulled and for naught held and esteemed, and that the said plaintiff-appellant be restored to all things which it has lost by reason of the said judgment. It is further considered and adjudged by the Court that said cause be remanded to the said Circuit Court of Jackson County for further proceedings to be had therein, in conformity with the opinion by this Court herein delivered; and that the said plaintiff-appellant recover against the said defendant-appellant its costs and charges herein expended, and have execution therefor. (Opinion filed.)

NOTE.—The opinion as modified appears on page — of this transcript.

IN SUPREME COURT OF MISSOURI

[Title omitted]

MINUTE ENTRY—January 21, 1936

Comes now the defendant-appellant, by attorney, and files herein a motion for rehearing and suggestions in support.

[fol. 5] IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER MODIFYING OPINION, ETC.—March 10, 1936

Now at this day, it is ordered by the Court that the opinion heretofore rendered herein be, and the same is hereby modified. And now the Court having seen and fully considered defendant-appellant's motion for a rehearing, doth order that said motion be, and the same is hereby overruled.

Which said modified opinion is in words and figures following, to-wit:

[fol. 6] IN SUPREME COURT OF MISSOURI, DIVISION NUMBER ONE, SEPTEMBER TERM, 1935

No. 33,028

KANSAS CITY LIGHT & POWER COMPANY, a Corporation, Plaintiff-Appellant,

vs.

MIDLAND REALTY COMPANY, a Corporation, Defendant-Respondent

OPINION

On February 27, 1908, the defendant entered into a contract with the plaintiff whereby plaintiff agreed to furnish steam heating service to defendant for several of defendant's buildings located in Kansas City, according to a certain schedule of rates set forth therein. This contract was for a period of five years beginning September 1, 1908, and ending August 31, 1913, with an option to defendant to extend the same for an additional five-year period by giving written notice. The option was exercised May 29, 1913. Before the contract had thus been extended the Public Service Commission Law of the State was enacted on March 17, 1913, and became immediately effective. [Laws, 1913, pp. 536-651, inc., R. S. 1929, Chap. 33.]

On June 28, 1917, the plaintiff filed a schedule of rates, effective August 1, 1917, for all of its steam heat customers.

Under this schedule the rates provided were higher than those provided in defendant's said contract.

Early in September, 1917, Kansas City and numerous [fol. 7] users of plaintiff's steam heat service (not including this defendant) filed with the Commission complaint against said schedule. After hearings had thereon the Commission, on February 11, 1918, found said rates to be "unjust and unreasonable and said rates and prices unreasonably high." [Case No. 1353, 5 P. S. C. Mo. 20.] Thereupon the Commission by order fixed and established as just and reasonable a lower schedule of rates and made same effective March 1, 1918. Plaintiff filed a new schedule accordingly. This rate also was higher than defendant's contract rate. It is to be noted that in its case No. 1353 the Commission made no attempt to separate or to allocate values and operating expenses as between heating and electrical services, and was unwilling to do so "without further investigation."

On June 11, 1918, plaintiff entered complaint before the Commission charging that its rates for electric service and for steam heat were inadequate and confiscatory. This complaint was docketed and heard as case No. 1615. [8 P. S. C. Mo. 223.] In this latter proceeding the Commission made the allocation which had been omitted in the other case, predicating the same upon its finding that the rates put into effect March 1, 1918, were "inadequate, unjust and unreasonably low, and that during none of the time was heating revenue sufficient even to meet the fuel expenses alone." And the Commission established new rates which displaced the next previous schedule of March 1, 1918. This new schedule did not become effective until December, 1919, as to steam heat, and was even higher than either of the next two preceding schedules. The Commission further found that "heretofore the steam heat business has been carried at a loss, and this loss has been borne either by the light and power consumers or by the company. This is a distinctly inequitable condition which must be eliminated as soon as practicable." The findings and order of the Commission established in said case No. 1615 were approved by this court in State ex rel. Mary B. Case, et al. v. Pub. Service Comm. et al., 298 Mo. 303, 249 S. W. 955.

After August 1, 1917, plaintiff billed defendant for its [fol. 8] steam heating service under the schedule effective

on that date until March, 1918, and thereafter under the schedule of the latter date until August 31, 1918, which was the date defendant claimed its contract expired: but defendant refused to pay as billed and made payments still in accordance with the rate in its contract, claiming said rates still to be effective, and such payments were credited on account by the plaintiff; the latter claiming the filed schedule rate was the legal and only rate that could be lawfully charged, and that the defendant's rate contract was void.

This case is for the recovery by the plaintiff from the defendant of the difference between the rates claimed to have been effective and the contract rates for the period August 31, 1917, to March 1, 1918, (pleaded in the first five counts of the petition), and the difference between the rates effective March 1, 1918, and the contract rates for the period from that date to and including August 31, 1918 (pleaded in the last six counts). The court nisi, on a trial without a jury, found against the plaintiff on the first five counts of the petition, and found for the plaintiff on the remaining six counts. Both parties appealed.

The foregoing statement with only slight change is the same as the statement contained in plaintiff's brief and conceded by defendant to be correct. The matters, orders and records referred to in the statement were all introduced in evidence on the trial. Apart from that there was no further evidence save the case of Marty, et al. v. Kansas City Light & Power Co., 303 Mo. 233, 259 S. W. 793, which was introduced. There is no dispute between the parties relative to the amount of the overplus of the schedule rates above defendant's contract rate. This case is before this court because of the constitutional questions of alleged impairment of obligations of contract and denial of due process raised as issues of law herein upon the undisputed facts.

The first contention of the parties is upon the legal effect of the rate schedule filed by plaintiff, as to which the Commission made no order between the date it was filed and the effective date, August 1, 1917.

[fol. 9] The defendant concedes that the schedule of August 1, 1917, may have been prima facie a legal one upon its filing as to non-contract customers, but was actually not lawful as so determined by the Commission upon a hearing thereon and the finding that "said schedule rates were un-

reasonably high and unjust and, therefore, unlawful." [P. S. C. Case No. 1353.] Defendant asserts that the last mentioned order was final and conclusive under Section 5238, R. S. 1929, which provides: "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive."

This schedule covering the period of its operation was considered and passed upon in State ex rel. Mary B. Case, et al., v. Pub. Service Comm., 298 Mo. supra, a proceeding to review the findings and order made by the Commission [Case No. 1615, 8 P. S. C. Mo. p. 223.], wherein our court on appeal, after reviewing said schedule and the proceedings leading to its establishment, held that the rates as fixed thereby were, under the statute (Sec. 5247, R. S. 1929), prima facie lawful and that the burden of proof rested upon the claimants to show by clear and satisfactory evidence that the order complained of was unreasonable, or unlawful as the case might be; and further held that the evidence (same as in this case) did not show that the rates attacked were unreasonable or unlawful. The court also determined that the allocation made by the Commission through its order in its case No. 1615 was not erroneous, but "was as accurate, fair and just, as reasonably possible or obtainable and should not be disturbed."

The Marty Case supra was a suit brought by heating service users of Kansas City against the plaintiff in this case to recover the amount of alleged excess charges paid by them for steam heat furnished during the period covered by the rate schedule now under consideration. That case involved the same evidence that is in this case. The opinion therein points out that no order having been made by the Commission suspending said schedule which materially increased the rates for heat, the same took effect after August 1, 1917. The plaintiffs there attacked said schedule as being unreasonable, excessive and unlawfully high, and [fol. 10] as unlawful in that it was filed without notice. In support of those issues the plaintiffs introduced in evidence the finding and order of February 11, 1918, in the making of which (Case No. 1353, 5 P. S. C. Mo. p. 20) no attempt was made to separate or allocate values and operating expenses as between users of heat and electricity. The court (l. c. 242) pointed out that the Commission did find that the heating rates under the plaintiff's schedule in effect from

August 1, 1917, to March 1, 1918, were excessive, and the Commission established a lower scale, which was yet higher than the one in effect prior to August 1, 1917. In response to the contention that this finding was conclusive in the collateral proceeding there at hand the court, after discussing the various orders and record facts which we have referred to in our statement, and after reviewing State ex rel. Mary B. Case, et al. v. Public Service Commission, supra, denied the contention, and held that the findings and order made by the Commission in the later case No. 1615, and sustained by this court in Mary B. Case's suit, wholly destroyed the general prior findings made by the Commission, with the result that there was no substantial evidence before the court that the rates which the consumers paid from August 1, 1917, to March 1, 1918, were excessive and unlawful, for on that matter the subsequent finding of the Commission was to the contrary. The court specifically held that defendant's previous schedule was prospective in operation and made without prejudice as to what might thereafter be shown on a fuller investigation and upon actual tests; that the order of January 11, 1918, fixed prospective rates only; that the rates which plaintiffs did actually pay were so low as to be confiscatory of the property of the defendant; (citing Vandalia R. R. Co. v. Schnull, 255 U. S. 113) and that the rate paid by the consumers from August 1, 1917, to March 1, 1918, was lawful, having been filed and having gone into effect under present Sections 5247 and 5228, R. S. 1929, and was further lawful in that it was neither unreasonable nor excessive as against the consumers and was unremunerative to the defendant. The court denied recovery.

We approve the construction thus placed on said rating [fol. 11] statutes. So, the filing by plaintiff of the rates effective August 1, 1917, primarily fixed by plaintiff's schedule were in the circumstances the effective rates pro tempore, though their reasonableness was not thereby finally determined. They were, in effect, subsequently found by the Commission, upon an investigation and hearing, to be not unreasonable or excessive but inadequate, unjust and unreasonably low; the steam heating service was given thereunder at a complete loss, of which the entire burden was placed upon the light and power consumers or on this plaintiff; and such rates were inequitable as to

such consumers, or confiscatory of this plaintiff's property. There is in this record no evidence to the contrary. In either view, therefore, the continuance of the same was against the public welfare. It follows a priori that the maintenance of a lower rate (the contract rate) than the later established rate was likewise against the public good. It was not only manifestly so but the statute expressly made it so. This statute [R. S. 1929, Section 5189], so far as pertinent reads: "No gas corporation, electrical (or heating) corporation, water corporation or municipality shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." This statute establishes a public policy for the public good, in the reasonable and non-discriminatory exercise of delegated police power.

It is argued for the defendant that paragraph 4 of Section 5208 of the statute expressly preserves heating contracts existing at the time the Act was passed. That section in its salient clause declares: "Nothing in this chapter shall be construed to prevent any telegraph or telephone corporation from continuing to furnish the use of its line, equipment or service under any contract or contracts in force at the date this article takes effect or upon the taking effect of any schedule or schedules of rates subsequently [fol. 12] filed with the Commission, as hereinafter provided, at the rate or rates fixed in such contract or contracts * * *." It is asserted that section 5228, which purports to extend the power of the Commission in relation to various other utilities "so far as the same shall be practical legal or necessary", is applicable to heating corporations.

It seems to be well settled by our decisions that the Commission has the power to fix by order reasonable telephone, light, power and heating charges at rates exceeding the maximum prescribed by ordinance, franchise, or individual contracts; that such an order does not in the constitutional sense impair the obligations of such contracts; and that such rates automatically supersede all rates coming into conflict therewith. [State ex rel. Sedalia v. Pub. Serv. Comm. 275 Mo. 201; 204 S. W. 497; City of Fulton v.

Pub. Serv. Comm.—in banc—275 Mo. 67, 204 S. W. 386; K. C. Bolt & Nut Co. v. Light & Power Co.—in banc—275 Mo. 529, 204 S. W. 1074; State ex rel. Washington Univ. v. Pub. Serv. Comm.—in banc—308 Mo. 328, 272 S. W. 971.] The decisions in the cited cases are based upon the theory that, since our State Constitution (Art. 12, sec. 5) declares that "the exercise of the police power of the state shall never be abridged", it can not be contracted away; and under the theory that our Public Service Commission is not a court and can not enforce contracts; but deals with public utilities upon the theory of public service, without regard to any contracts; that it is a fact-finding body whose findings and orders, being prima facie reasonable and lawful, are subject to judicial review in that respect only.

The Bolt and Nut Company Case supra is essentially similar to the case at bar. There a public service corporation by written contract agreed to supply electric energy to a private manufacturer for a designated length of time at designated rates. Higher rates were subsequently fixed by the State Public Service Commission by the adoption of a schedule applicable for all services of the kind furnished by the service corporation. The court in banc held that the latter rates, being reasonable, automatically superseded all contract rates coming in conflict with them, and the court denied injunction sought to re-[fol. 13] strain the collection of the increased rates. The case was affirmed on appeal to the Federal Supreme Court [252 U. S. 571, No. 241] upon the authority of Union Dry Goods Co. v. Georgia Pub. Serv. Corp. 248 U. S. 372, 9 A. L. R. 1320.

The Washington University Case supra was a direct attack made against an order of the Commission raising rates of a light and power company for electric and heating service. The increased rates were attacked by some 18 consumers who had previously entered into term contracts with the company for a lower rate than that fixed by the Commission. This court held (l. c. 342): "These contracts are of no validity, in so far as they affect rates. The Public Service Commission, in fixing rates, can not be clogged or obstructed by contract rates. This question was early threshed out by this court in several cases, some of which went to the Federal Supreme Court, in each of which this court was sustained. The original case, the ruling in which has never been changed, is State ex rel. City of Sedalia v.

Public Service Commission, 275 Mo. 201. As said, such body is not a court, and has neither the power to construe contracts nor to enforce them."

So, in the light of our decisions supra, we have no hesitancy in reaffirming that the statute purporting to preserve existing contracts does not operate to exempt such contracts from the scope of the exercise of the police power of the State to protect or promote the general or public welfare by regulating rates of public utilities so as to raise or lower, as the case may be, previously existing contract rates. We are of the opinion that the Commission's findings and order expressly made are in legal effect, since there was no substantial evidence to the contrary, decisive that said contract rate was unreasonable, and that said rate schedule in question superseded the contract rate and rendered the latter nugatory.

The defendant contends strenuously that this can not be [fol. 14] so; that "before a contract for a utility rate, entered into before the passage of the Public Utility Act, can be deemed to have been abrogated, it is essential that the Commission, in the course of an orderly procedure, viz., in a procedure in which the affected parties and the subject matter of the contract are before it, make an express finding that the contract rates are unreasonable." This contention goes alike to all the counts. It invokes the contract clause, and the due process clause of the Fourteenth Amendment, of the Federal Constitution. The chief federal cases cited and relied upon by the defendant are Arkansas National Gas Co. v. Arkansas R. Comm. 261 U. S. 379, 67 L. Ed. 705 and Wichita R. & L. Co. v. Public U. C. 260 U. S. 48, 67 L. Ed. 124.

In the Arkansas Case the Public Utility sought injunction against the continuance of rates fixed by contract with consumers, on the ground that they were virtually confiscatory of the property of the utility company as the result largely of improper and wasteful methods of the particular consumers holding the contracts. There was no claim that rates to other consumers were affected by those contracts, nor did it appear that the public interest was involved in the action which the Commission was asked to take. The court, after pointing out the power of the state to regulate public utilities and fix rates, notwithstanding what the effect might be to modify or abrogate private contracts, said (l. c. 382): "There is, quite clearly, no principle which im-

poses an obligation to do so merely to relieve a contracting party from the burdens of an improvident undertaking. The power to fix rates, when exerted, is for the public welfare, to which private contracts must yield, but it is not an independent legislative function to vary or set aside such contracts, however unwise and unprofitable they may be. Indeed, the exertion of legislative power solely to that end is precluded by the contract impairment clause of the Constitution. The power does not exist per se. It is the intervention of the public interest which justified and at the same time conditions its exercise." In the present case there was no purpose to relieve the plaintiff of an improvident [fol. 15] undertaking. Another feature which distinguishes that case from the instant case is shown above; it consists in that here the inadequate rates for heating service were unreasonable and grossly discriminatory as between the users of that service and the users of electrical service, and yielded no revenue from the first mentioned service. Detriment to the public interest by any recognition of the contract rate is implicit in the later findings and orders made by the Commission.

In the Wichita case the Public Utility Commission of Kansas put into effect a schedule of rates in lieu of contract rates. This schedule was filed by the Wichita company and purportedly went into effect with the consent of the commission without a hearing or a finding or a decision involving the same. The Federal Supreme Court adopted the construction which the Kansas Court had placed upon its rating statutes, holding that that schedule was not effective in lieu of the contract rates, and that, in any event, rates previously agreed upon between utilities and patrons will continue in force until the commission has found them to be unreasonable and has prescribed other rates. The court added: "This conclusion accords with the construction put upon similar statutes in other states. Public Utility Comm. v. Springfield Gas & Elec. Co. 291 Ill. 209; Public Utility Comm. v. B. & O. S. W. R. R. Co. 281 Ill. 405. Moreover, it accords with general principles of constitutional government."

These principles were stated thus: "In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it certain rules of procedure and certain rules of decision in the performance of its function. It is a wholesome and

necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective."

[fol. 16] Under the construction our court has placed upon our statute authorizing substituted rates for existing rates the statute does not require any finding of facts, or the making of any order as a condition precedent to the validity of plaintiff's schedule of 1917 and its effectiveness as of August 31, 1917. As regards the Commission's schedule of substituted rates of March 1, 1918, it does appear that the same rested upon an express finding of facts and orders of the Commission as foundational. In each instance the Commission met the requirements of our statutes. These observations and others made earlier herein point out sufficiently, we think, the distinction between the Wichita Case and this case, especially as the Federal Courts in their consideration of local constitutions and statutes will follow the construction placed upon them by the state courts. [Georgia Ry. Co. v. Decatur, 262 U. S. 432, 437.]

Furthermore, since the Commission was without judicial power to determine finally the defendant's rights under the contract, but only the facts controlling such rights prima facie and tentatively, it would seem that as yet there has been no infringement upon defendant's constitutional guaranties against impairment of contract or denial of due process of law. From the number of cases that have come to this court and the number of parties involved in them, it may fairly be inferred that the rate schedules in question were of more than passing local interest and notoriety, and that the defendants were aware of them from the beginning. The usual process of the courts to determine the validity of the controverted schedules, was available to either party, although defendant was under no necessity to avail itself thereof, since the heat service was not shut off. Yet the matter was in dispute between the parties from the time of the first change in the rate schedule. This suit was brought in 1921, and as stated in the briefs was continued thereafter [fol. 17] by common consent, presumably awaiting some fortuitous decision of some kindred case, until it went to

trial some eleven years later. Usual process is being availed of by the defendant as well as by the plaintiff in this proceeding, in a mode of procedure provided by the State and adequate to safeguard and determine defendant's contractural rights in the premises. This, we think, meets the requirements of the constitutional right to due process of law. [Hurtado v. California, 110 U. S. 516, l. c. 534, 535.]

The court nisi, pursuant to its denial of declarations of law offered by the defendant, found and adjudged, in substance, as follows: (1) That paragraph 4 of Section 5208 did not operate to keep in force and effect defendant's contract in question during the period involved in counts six to eleven, inclusive, of plaintiff's petition; (2) that to permit plaintiff to recover on said counts six to eleven, inclusive, would be in violation of said contract clause, and the due process clause of the Fourteenth Amendment, of the Constitution; and pursuant to an instruction given at defendant's request the court found and adjudged (3) that to permit plaintiff to recover on counts one to five, inclusive, would be in violation of said contract and due process clauses.

We are of the opinion that that part of the trial court's decision relating to counts one to five, inclusive, was erroneous and that in respect of counts six to eleven, inclusive, it was correct. As has already been pointed out there is no substantial evidence in the record to support the trial court's denial of a recovery on the first five counts. The entire record made by the Commission was presented to the trial court for a present determination from the whole record as a matter of law whether the same contains findings made by the Commission which in form or in essence impel the conclusion that during the periods in controversy the defendant's contract rate was unreasonable and against the public interest and was superseded and supplanted by the rate schedules in question. We are of the opinion that such is the proper conclusion. This conclusion is reinforced by [fol. 18] the somewhat analogous case of Denny v. Pac. Tele. & Tele. Co., 276 U. S. 97, 72 L. Ed. 483, 48 Sup. Ct. Rep. 223, cited by the plaintiff.

The Denny Case dealt, as we are now dealing, with facts accomplished. The court therein, responding to a contention similar to the principal one made by defendant, herein said: " * * * It appears to be argued that the

rates provided in the contract should continue until the commission makes an order specifically declaring and directing in so many words that the contract shall be terminated. We may look over the fact, if need be, that upon the petition of the city the rates were reduced in 1913, and that in 1918 they were increased upon application of the Gas Company, and consider the franchise contract as having been wholly undisturbed until the present time, and still we would be compelled to determine, as we do determine, that the present o-der of the Department of Public Works is just as effective as if, after fixing the rates, there had been added thereto the words 'and it is hereby directed that the rates provided in the franchise shall be and they are hereby terminated', or words of similar import. That is the legal effect of what was done, and the form or the language by which it was imported is not very material."

So, on the predetermined and undisputed facts before us we hold that the contract in controversy should be deemed nugatory from and after August 31, 1917.

The judgment of the circuit court is reversed and the cause remanded with directions to enter judgment for the plaintiff on all counts of the petition as prayed therein.

All concur.

Charles Thomas Hays, Judge.

[fol. 19] IN SUPREME COURT OF MISSOURI

[Title omitted]

MINUTE ENTRY—March 20, 1936

Comes now the defendant-appellant, by attorney, and files herein a motion for rehearing on the modified opinion.

IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER OVERRULING MOTION FOR REHEARING—April 23, 1936

Now at this day, the Court having seen and fully considered defendant-appellant's motion for rehearing on the

modified opinion, doth order that said motion be, and the same is hereby overruled.

[fol. 20] IN SUPREME COURT OF MISSOURI

KANSAS CITY POWER & LIGHT COMPANY, a Corporation, Plaintiff-Appellant,

vs.

MIDLAND REALTY COMPANY, a Corporation, Defendant-Appellant.

Appeal from Circuit Court of Jackson County

JUDGMENT—June 8, 1936

Now at this day, it appearing to the Court that the mandate dated January 11, 1936, and issued on May 23, 1936, has been recalled pursuant to an order of this Court heretofore entered herein. And it appearing to the Court from further examination of the record and the opinion of this Court, rendered on January 11, 1936, as modified March 10, 1936, that the conclusion in said opinion and the judgment entered thereon do not conform to the record in said cause, and the findings contained in said opinion. It is therefore ordered by the Court that the opinion be, and the same is hereby modified, nunc pro tunc, to conform with the record and findings in said opinion. And it is further ordered that the judgment, nunc pro tunc, be entered as of April 23, 1936, the date on which said motion for rehearing on the modified opinion was overruled, which said nunc pro tunc judgment is as follows: Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered, be reversed, annulled and for naught held and esteemed, and that the said plaintiff-appellant be restored to all things which it has lost by reason of said judgment. It is further considered and adjudged by the Court that the said cause be remanded to the said Circuit Court of Jackson County with directions

to enter judgment for the plaintiff on all counts of the petition as prayed therein; and that the said plaintiff-appellant recover against the said defendant-appellant its costs and charges herein expended and have therefor execution.

[fol. 21] IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER OVERRULING MOTION TO TRANSFER TO COURT EN BANC —June 18, 1936

Comes now the defendant-appellant, by attorney, and after obtaining leave of court files herein a motion to transfer to court en banc; and the Court having seen and fully considered said motion to transfer to court en banc doth order that said motion be, and the same is hereby overruled.

[fol. 22] IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER ALLOWING APPEAL—June 27, 1936

The petition of Midland Realty Company, Appellant in the above entitled cause, for an appeal therein to the Supreme Court of the United States from the Supreme Court of the State of Missouri, Division No. 1, and the Assignment of Errors filed therewith, and the record of said cause having been considered; it is ordered, that an appeal be and is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Missouri, Division No. 1, as prayed in said petition.

It is further ordered that the Appellant execute to the Respondent, the Kansas City Power & Light Company, its bond, with surety to be approved by the undersigned, in the sum of $7,000, conditioned according to law.

It is further ordered that the Clerk of this Court, within forty days from this date, make and transmit to the Clerk

of the United States Supreme Court, under his hand and the seal of this Court, a transcript of the record herein, containing a true copy of all material parts of the record herein, which shall be designated by præcipe filed with him by any of the parties hereto.

Done this 27th day of June, 1936.

Charles T. Hays, Presiding Judge of the Supreme Court of Missouri, Division No. 1. George Robb Ellison, Chief Justice of the Supreme Court of Missouri.

[fol. 23] IN SUPREME COURT OF MISSOURI

[Title omitted]

PETITION OF MIDLAND REALTY COMPANY FOR AN APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed June 27, 1936

Considering itself aggrieved by the final decision of the Supreme Court of the State of Missouri, in the above entitled cause, the Midland Realty Company, a corporation, defendant herein, and Appellant and Respondent in this Court, hereby prays that an appeal by this defendant be allowed to the Supreme Court of the United States herein to the end that said judgment of the Supreme Court of Missouri, Division No. 1, may be there reviewed and considered and justice done this appellant, and that an order be made fixing the amount of the bond required of appellant herein on such appeal. Said appellant submits and files herewith its Assignment of Errors upon such appeal.

As ground for appeal herein and for the jurisdiction of the United States Supreme Court on this appeal, Appellant shows that on February 27, 1908, it entered into a contract, in evidence, with appellee herein, or its predecessor company, for steam heating service, at the rates therein named, for a term beginning September 1, 1908, and ending August 3, 1918, and that appellee furnished steam to appellant during the whole term of said contract, and that [fol. 24] appellant paid in full, according to contract, for said service; that in the year 1913 there was enacted what is known as the Public Service Commission Act of Mis-

souri (Chapter 33, R. S. Mo. 1929); that, by virtue of said Act, appellee filed with the Public Service Commission on June 19, 1917, a schedule of rates for steam heat service, for its customers generally, but no finding or order was made by the Commission with respect thereto. The rates named in said schedule were higher than the rates provided in said contract. In the first five counts of its petition herein plaintiff, appellee, seeks to recover of this appellant the difference between what is paid, according to said contract, for heat service from October 1, 1917 to March 1, 1918, and what appellee claims that appellant should have paid, according to said filed schedule.

On February 11, 1918, said Commission made a finding and order setting aside the said filed schedule of rates, as being unlawful, and promulgated a schedule of heating rates, effective March 1, 1918, for appellee's heat customers, generally, in which the named rates were somewhat higher than those named in appellant's contract aforesaid. Appellant's said contract was not at any time considered by said Commission, or other tribunal, and no finding or order was ever made with respect thereto, and appellant continued, thereafter, to receive steam heat service from appellee and to pay for the same, according to contract, until said contract expired on August 31, 1918. Plaintiff, appellee, seeks to recover, in the last six counts of its petition herein, the difference between what appellant paid, according to contract, and what appellee claims that appellant should have paid, according to said promulgated schedule, for heating service from March 1, 1918, to August 31, 1918.

Plaintiff, appellee here, asserts that by virtue of the provisions of said Public Service Commission Act, appellant's said contract was abrogated and rendered nugatory upon [fol. 25] and by the mere filing of said schedule of heating rates on June 19, 1917. Appellant, in its answer herein, and otherwise contends that said act (Chapter 33, R. S. Mo. 1929), so construed and applied as to abrogate and render nugatory said contract, without any hearing or finding or order by the Commission, or other tribunal, with respect to said contract, violates and is repugnant to Section 10 of Article I of the Constitution of the United States, which provides that no State shall pass any law which impairs the obligation of contracts, and violates the Four-

teenth Amendment to said Constitution, which prohibits the taking of one's property without due process of law.

The decision of the Supreme Court of Missouri, the highest Court of the State, was against the contention of appellant, and in favor of the contention of plaintiff, appellee, and in favor of the validity of said statute, as so construed and applied, and said Court directed that plaintiff have judgment, as prayed, on all Counts of its petition.

Elliott H. Jones, Attorney for said Appellant.
Scarritt, Jones & North, of Counsel.

[fol. 26] IN SUPREME COURT OF MISSOURI

ASSIGNMENT OF ERRORS—Filed June 27, 1936

Comes now the Appellant above named, Midland Realty Company, and as appellant to the Supreme Court of the United States from the judgment and decision heretofore entered in the Supreme Court of Missouri, Division No. 1, assigns as error:

(1) The Supreme Court of Missouri erred in ruling that the schedule of heating rates, which was merely filed with the Public Service Commission of Missouri by plaintiff on June 19, 1917, with the effective date August 1, 1917, without any hearing, finding, or order of the Commission thereon had the effect of abrogating or rendering nugatory the contract, in evidence, between the defendant and the Kansas City Heating Company, plaintiff's predecessor, dated February 27, 1908, and the effect of such decision of the Supreme Court of Missouri herein was to cause the taking of and property rights of defendant, appellant, in said contract, without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(2) The Supreme Court of Missouri erred in ruling that the schedule of steam heating rates filed on February 11, 1918, with effective date March 1, 1918, put into effect, as to steam heat customers, generally, had the effect of abrogating or rendering nugatory the contract between defendant, appellant, and Kansas City Heating Company, plaintiff's predecessor, dated February 27, 1908, shown in the

record herein. And the effect of said decision and judgment of the Supreme Court of Missouri was to take the property and the property rights of the defendant, appellant herein, in said contract, without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(3) The contract, in evidence, between defendant and Kansas City Heating Company, predecessor to plaintiff, [fol. 27] was fully performed, on both sides, throughout its full term, and defendant's rights thereunder became fully vested. In awarding to plaintiff a sum or sums over and in excess of what defendant paid, which was in full compliance with said contract, for the heating service concerned herein, the decision of the Supreme Court of Missouri herein has served to take defendant's vested rights in said contract without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(4) The Supreme Court of Missouri erred in refusing to hold that paragraph 4 of Section 5208, R. S. Mo., 1929, denied the power to the Public Service Commission or to the Courts to abrogate defendant's said contract, in evidence, for heating service. The effect of such ruling was to take defendant's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, and to so interpret and apply the Missouri statute, known as the Public Service Commission Act, as to impair the obligation of said contract, in violation of Section 10 of Article I of said Constitution.

(5) The said Supreme Court of Missouri, in awarding a recovery to plaintiff, on the first five counts of its petition herein, by reason of and based upon a schedule of heating rates which the Public Service Commission of Missouri, acting within its proper and exclusive province, upon a due and proper hearing, had conclusively found and declared to be unreasonable, unlawful and void, has taken defendant's property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

(6) The decision of the Supreme Court of Missouri, Division No. 1, herein, to the effect that the mere passage

of the Public Service Commission Act of Missouri (Chapter 33, R. S. Mo. 1929) and the mere filing by the public utility company of a schedule of rates (concerned in the first five counts of the petition) for its service to its cus-
[fol. 28] tomers, generally, in accordance with said Act, or the mere putting into effect by the Public Service Commission of a schedule of rates (concerned in the last six counts of the petition) for the service of said utility company, for its customers, generally, had the effect of abrogating or rendering nugatory defendant's said contract with such utility company, which contract was made and entered into prior to the passage of said Public Service Commission Act, although there never was any hearing or proceeding before the Public Service Commission, or other tribunal with reference to said contract, or any finding that said contract ought to be or should be abrogated in the interest of the public welfare, or otherwise, was such as to violate Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides that one's property cannot be taken without due process of law, and to violate Section 10 of Article I of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of a contract.

For which errors the Appellant above named, Midland Realty Company, a corporation, prays that the said judgment and decision of the Supreme Court of the State of Missouri, Division No. 1, dated April 23, 1936, in the above entitled cause, be reversed and that judgment be ordered in favor of the said Appellant, and for costs.

Elliott H. Jones, Counsel for said Appellant. Searritt, Jones & North, of Counsel.

[fol. 28½] [File endorsement omitted.]

[fol. 29] Citation, in usual form, showing service on L. Graves, omitted in printing.

[fol. 30] IN SUPREME COURT OF MISSOURI

[Title omitted]

NOTICE OF APPEAL—Filed July 3, 1936

To the Appellee, Kansas City Power & Light Company, or its attorneys of record:

You will please take notice that defendant, Appellant, Midland Realty Company, feeling aggrieved by the judgment rendered in the above entitled cause on April 23, 1936, in the Supreme Court of Missouri, Division No. 1, has appealed from said judgment to the United States Supreme Court, a copy of Appellant's petition for appeal being hereto attached.

Elliott H. Jones, Attorney for said Appellant.

Copy of the foregoing Notice, and of the petition for appeal, received this July 1st, 1936.

Ludwich Graves, Irvin Fane, Johnson, Lucas, Landon, Graves & Fane, Attorneys for Appellee, Kansas City Power & Light Company.

[File endorsement omitted.]

[fol. 30-1] IN SUPREME COURT OF MISSOURI, DIVISION NO. 1, SEPTEMBER TERM, 1935

No. 33028

KANSAS CITY POWER & LIGHT COMPANY, a Corporation, Plaintiff-Appellant,

vs.

MIDLAND REALTY COMPANY, a Corporation, Defendant-Appellant

Appeals from the Circuit Court of Jackson County, Missouri, Division No. 3

Hon. T. J. Seehorn, Judge

Joint Abstract of Record of Plaintiff-Appellant and Defendant-Appellant

RECORD PROPER

FOREWORD

In the above entitled cause all proceedings hereinafter named were had and taken in the Circuit Court of Jackson County, Missouri, at Kansas City.

The caption in all pleadings, signatures, judgment and orders, except as to the term, were as follows: "In the Circuit Court of Jackson County, Missouri, at Kansas City. [fol. 30-2] Kansas City Power & Light Company, a corporation, plaintiff, vs. Midland Realty Company, a corporation, defendant, No. 160617."

All proceedings hereinafter mentioned and referred to were had in the Circuit Court of Jackson County, Missouri, and all pleadings were filed in the Circuit Court of Jackson County, Missouri, as shown by the records and filings of said court. For the sake of brevity, captions and signatures are omitted in this abstract, but were fully set out in the original papers.

Petition

This case went to trial on the 27th day of August, 1932, the same being the sixtieth day of the May term, 1932, of the said court, before Hon. T. J. Seehorn, Judge of Division

No. 3 of the Circuit Court of Jackson County, Missouri, a jury trial having theretofore been waived, upon the following second amended petition, duly filed in the Circuit Court of Jackson County, Missouri, at Kansas City:

SECOND AMENDED PETITION

Count I

1. The Kansas City Power & Light Company says that it is a corporation organized and existing under the laws of the State of Missouri, and is engaged in the production, distribution and selling of electricity for light, heat and power and steam for heating in Kansas City, Missouri, and [fol. 30-3] is a public utility company subject to the laws of the State of Missouri and the orders of the Public Service Commission of the State of Missouri, and further states that it is the successor of the Kansas City Light & Power Company, a corporation, and of the Kansas City Heating Company, a corporation, and is the owner and assignee of all the choses in action, rights and privileges, accounts, property, contract and assets of said companies.

2. That at all of the times hereinafter mentioned, the Kansas City Light & Power Company was a corporation organized and existing under the laws of the State of Missouri, and engaged in the production, distribution and selling of electricity for light, heat and power and steam for heating in Kansas City, Missouri, and was a public utility company subject to the laws of the State of Missouri and the orders of the Public Service Commission of the State of Missouri.

3. That the defendant is and was at all of the times hereinafter mentioned a corporation duly organized and existing according to law.

4. That prior to August 1, 1917, to-wit: on June 19, 1917, the Kansas City Light & Power Company filed with the Public Service Commission of the State of Missouri the rates to be charged on and after August 1, 1917, by the Kansas City Light & Power Company to its customers for heat as follows:

"Steam Heating Service"

First	50,000	lbs.	of	condensation	per	mo.	$1.00	per	1000 lbs.
Next	50,000	"	"	"	"	"	.90	"	" "
Next	100,000	"	"	"	"	"	.80	"	" "
Next	200,000	"	"	"	"	"	.75	"	" "
Next	400,000	"	"	"	"	"	.70	"	" "

All in excess of 800,000 lbs. of condensation per month, 60c per thousand lbs.

[fol. 30-4] That said rates so filed on June 19, 1917, with the Public Service Commission of the State of Missouri, were not ordered suspended by the said Public Service Commission, and went into full force and effect on August 1, 1917, and became the lawful rates for heat and the only rates for heat that could be charged by the Kansas City Light & Power Company to its customers for heat for the period from and including August 1, 1917, to and including April 30, 1918.

5. Plaintiff further states that at the said rates on file with the Public Service Commission, the Kansas City Light & Power Company furnished to defendant for heating the buildings at the southwest corner of Tenth and Oak Streets, northwest corner of Tenth and McGee Streets, No. 1008 Oak Street, and at the southeast corner of Tenth and McGee Streets, in Kansas City, Missouri, from the 1st day of October, 1917, to the 31st day of October, 1917, steam for heating of the value, according to said rates, of six hundred fifty & 50/100 ($650.50) dollars; that the delinquent date for the payment of said bill was November 15, 1917, said bill having been duly rendered to the defendant by the Kansas City Light & Power Company on or before November 5, 1917; that on December 18, 1917, the defendant paid on account of said bill the sum of three hundred forty-four & 85/100 ($344.85) dollars, leaving a balance due and unpaid upon said bill of three hundred and five & 65/100 ($305.65) dollars which defendant refused to pay and still refuses to pay.

6. Wherefore, plaintiff prays judgment against the defendant on the first count for the sum of three hundred and [fol. 30-5] five & 65/100 ($305.65) dollars, with interest on six hundred fifty & 50/100 ($650.50) dollars from November 16, 1917, to December 18, 1917, and interest on three hundred and five & 65/100 ($305.65) dollars from December 19, 1917, until the date of judgment herein.

Count II

1. For its second count against the defendant the plaintiff adopts and restates as is recited heretofore all the allegations and matters contained in paragraphs 1, 2, 3 and 4 of Count I of this petition, and further states:

2. That at the said rates on file with the Public Service Commission, the Kansas City Light & Power Company furnished to defendant for heating the buildings set out in paragraph 5 of Count I of this petition, from the 1st day of November, 1917, to the 30th day of November, 1917, steam for heating of the value, according to said rates, of seven hundred sixty-eight & 26/100 ($768.26) dollars; that the delinquent date for the payment of said bill was December 15, 1917, said bill having been duly rendered to the defendant by the Kansas City Light & Power Company on or before December 5, 1917; that on December 14, 1917, the defendant paid on account of said bill the sum of four hundred ten & 23/100 ($410.23) dollars, leaving a balance due and unpaid upon said bill of three hundred fifty-eight & 03/100 ($358.03) dollars, which defendant refused to pay and still refuses to pay.

[fol. 30-6] 3. Wherefore, plaintiff prays judgment against the defendant on the second count for the sum of three hundred fifty-eight & 03/100 ($358.03) dollars with interest thereon from December 15, 1917, until the date of judgment herein.

Count III

1. For its third count against the defendant, the plaintiff adopts and reiterates as is recited heretofore all the allegations and matters contained in paragraphs 1, 2, 3 and 4 of Count I of this petition, and further states:

2. That at the said rates on file with the Public Service Commission, the Kansas City Light & Power Company furnished to defendant for heating the buildings set out in paragraph 5 of Count I of this petition, from the 1st day of December, 1917, to the 31st day of December, 1917, steam for heating of the value, according to said rates, of one thousand two hundred and seven & 45/100 ($1,207.45) dollars; that the delinquent date for the payment of said bill was January 15, 1918, said bill having been duly rendered

to the defendant by the Kansas City Light & Power Company on or before January 5, 1918; that on January 15, 1918, the defendant paid on account of said bill the sum of six hundred eighty-eight & 61/100 ($688.61) dollars, leaving a balance due and unpaid upon said bill of five hundred eighteen & 84/100 ($518.84) dollars, which defendant refused to pay and still refuses to pay.

3. Wherefore, plaintiff prays judgment against the defendant on the third count for the sum of five hundred [fol. 30-7] eighteen & 84/100 ($518.84) dollars with interest thereon from January 15, 1918.

Count IV

1. For the fourth count against the defendant, the plaintiff adopts and reiterates as is recited heretofore all the allegations and matters contained in paragraphs 1, 2, 3 and 4 of Count I of this petition, and further states:

2. That at the said rates on file with the Public Service Commission, the Kansas City Light & Power Company furnished to defendant for heating the buildings set out in paragraph 5 of Count I of this petition, from the 1st day of January, 1918, to the 31st day of January, 1918, steam for heating of the value, according to said rates, of one thousand three hundred sixteen & 09/100 ($1,316.09) dollars; that the delinquent date for the payment of said bill was February 15, 1918, said bill having been duly rendered to the defendant by the Kansas City Light & Power Company on or before February 5, 1918; that on February 12, 1918, the defendant paid on account of said bill the sum of seven hundred fifty-five & 23/100 ($755.23) dollars, leaving a balance due and unpaid upon said bill of five hundred sixty & 86/100 ($560.86) dollars, which defendant refused to pay and still refuses to pay.

3. Wherefore, plaintiff prays judgment against the defendant on the fourth count for the sum of five hundred sixty & 86/100 ($560.86) dollars, with interest thereon from February 15, 1918, until the date of judgment herein.

[fol. 30-8] Count V

1. For its fifth count against the defendant, the plaintiff adopts and reiterates as is recited heretofore all the allega-

tions and matters contained in paragraphs 1, 2, 3 and 4 of Count I of this petition, and further states:

2. That at the said rates on file with the Public Service Commission, the Kansas City Light & Power Company furnished to defendant for heating the buildings set out in paragraph 5 of Count I of this petition, from the 1st day of February, 1918, to the 28th day of February, 1918, steam for heating of the value, according to said rates, of one thousand one hundred forty-one & 04/100 ($1,141.04) dollars; that the delinquent date for the payment of said bill was March 15, 1918, said bill having been duly rendered to the defendant by the Kansas City Light & Power Company on or before March 5, 1918; that on March 15, 1918, the defendant paid on account of said bill the sum of six hundred forty-five & 67/100 ($645.67) dollars, leaving a balance due and unpaid upon said bill of four hundred ninety-five & 37/100 ($495.37) dollars, which defendant refused to pay and still refuses to pay.

3. Wherefore, plaintiff prays judgment against the defendant on the fifth count for the sum of four hundred ninety-five & 37/100 ($495.37) dollars, with interest thereon from March 15, 1918, until the date of judgment herein.

[fol. 30-9] Count VI

1. For its sixth count against the defendant, the plaintiff adopts and reiterates as is recited heretofore all the allegations and matters contained in paragraphs 1, 2 and 3 of Count I of this petition, and further states:

2. That on or prior to March 1st, 1918, the Public Service Commission of the State of Missouri fixed the rates to be charged on and after March 1, 1918, by the Kansas City Light & Power Company to its customers for heat, as follows:

"Steam Heating Service"

First 20,000 lbs. of condensation per mo. $0.85 per 1000 lbs.
Next 180,000 " " " " " .70 " " "
Next 500,000 " " " " " .60 " " "
All in excess of 700,000 lbs. of condensation per month, 50c per thousand lbs.

3. Plaintiff further states that at the rates fixed by the Public Service Commission, the Kansas City Light & Power Company furnished to defendant for heating the buildings

at the southwest corner of Tenth and Oak Streets, northwest corner of Tenth and McGee Streets, No. 1008 Oak Street, and at the southeast corner of Tenth and McGee Streets, in Kansas City, Missouri, from the 1st day of March, 1918, to the 31st day of March, 1918, steam for heating of the value, according to said rates, of five hundred and five & 92/100 ($505.92) dollars; that the delinquent date for the payment of said bill was April 15, 1918, said bill having been duly rendered to the defendant by the Kansas City Light & Power Company on or before April 5, 1918; that on April 11, 1918, the defendant paid on account of said bill the sum of three hundred sixteen & 48/100 ($316.48) dollars, leaving a balance due and unpaid upon [fol. 30-10] said bill of one hundred eighty-nine & 44/100 ($189.44) dollars, which defendant refused to pay and still refuses to pay.

4. Wherefore, plaintiff prays judgment against the defendant on the sixth count for the sum of one hundred eighty-nine & 44/100 ($189.44) dollars, with interest thereon from April 15, 1918, until the date of judgment herein.

Count VII

1. For its seventh count against the defendant, the plaintiff adopts and reiterates as is recited heretofore all the allegations and matters contained in paragraphs 1, 2 and 3 of Count I and paragraph 2 of Count VI of this petition and further states:

2. That at the said rates fixed by the Public Service Commission, the Kansas City Light & Power Company furnished to defendant for heating the buildings set out in paragraph 3 of Count VI of this petition, from the 1st day of April, 1918, to the 30th day of April, 1918, steam for heating of the value, according to said rates, of four hundred sixty-seven & 26/100 ($467.26) dollars; that the delinquent date for the payment of said bill was May 15, 1918, said bill having been duly rendered to the defendant by the Kansas City Light & Power Company on or before May 5, 1918; that on May 11, 1918, the defendant paid on account of said bill the sum of two hundred eighty-seven & 18/100 ($287.18) dollars, leaving a balance due and unpaid upon said bill of one hundred eighty & 08/100 ($180.08) dollars, which defendant refused to pay and still refuses to pay.

[fol. 30-11] 3. Wherefore, plaintiff prays judgment against the defendant on the seventh count for the sum of one hundred eighty & 08/100 ($180.08) dollars, with interest thereon from May 15, 1918, until the date of judgment herein.

Count VIII

1. For its eighth count against the defendant, the plaintiff adopts and reiterates as is recited heretofore all the allegations and matters contained in paragraphs 1, 2 and 3 of Count I, and paragraph 2 of Count VI of this petition and further states:

2. That at the said rates fixed by the Public Service Commission, the Kansas City Light & Power Company furnished to defendant for heating the buildings set out in paragraph 3 of Count VI of this petition, from the 1st day of May, 1918, to the 31st day of May, 1918, steam for heating of the value, according to said rates, of one hundred eighty-eight & 57/100 ($188.57) dollars; that the delinquent date for the payment of said bill was June 16, 1918, said bill having been duly rendered to the defendant by the Kansas City Light & Power Company on or before June 5, 1918; that on June 17, 1918, the defendant paid on account of said bill the sum of one hundred and five & 31/100 ($105.31) dollars, leaving a balance due and unpaid upon said bill of eighty-three & 26/100 ($83.26) dollars, which defendant refused to pay and still refuses to pay.

3. Wherefore, plaintiff prays judgment against the defendant on the eighth count for the sum of eighty-three & 26/100 ($83.26) dollars, with interest thereon from June [fol. 30-12] 15, 1918, until the date of judgment herein.

Count IX

1. For its ninth count against the defendant, the plaintiff adopts and reiterates as is recited heretofore all the allegations and matters contained in paragraphs 1, 2 and 3 of Count I and paragraph 2 of Count VI of this petition and further states:

2. That at the said rates fixed by the Public Service Commission, the Kansas City Light & Power Company furnished to defendant for heating the buildings set out in paragraph 3 of Count VI of this petition, from the 1st day of June,

1918, to the 30th day of June, 1918, steam for heating of the value, according to said rates, of eighty-seven & 50/100 ($87.50) dollars; that the delinquent date for the payment of said bill was July 15, 1918, said bill having been duly rendered to the defendant by the Kansas City Light & Power Company on or before July 5, 1918; that on July 15, 1918, the defendant paid on account of said bill the sum of forty-five & 83/100 ($45.83) dollars, leaving a balance due and unpaid upon said bill of forty-one & 67/100 ($41.67) dollars, which defendant refused to pay and still refuses to pay.

3. Wherefore, plaintiff prays judgment against the defendant on the ninth count for the sum of forty-one & 67/100 ($41.67) dollars, with interest thereon from July 15, 1918, until the date of judgment herein.

[fol. 30-13] Count X

1. For its tenth count against the defendant, the plaintiff adopts and reiterates as is recited heretofore all the allegations and matters contained in paragraphs 1, 2 and 3 of Count I and paragraph 2 of Count VI of this petition and further states:

2. That at the said rates fixed by the Public Service Commission, the Kansas City Light & Power Company furnished to defendant for heating the buildings set out in paragraph 3 of Count VI of this petition, from the 1st day of July, 1918, to the 31st day of July, 1918, steam for heating of the value, according to said rates, of ninety-two & 82/100 ($92.82) dollars; that the delinquent date for the payment of said bill was August 15, 1918, said bill having been duly rendered to the defendant by the Kansas City Light & Power Company on or before August 5, 1918; that on August 13, 1918, the defendant paid o naccount of said bill the sum of forty-eight & 71/100 ($48.71) dollars, leaving a balance due and unpaid upon said bill of forty-four & 11/100 ($44.11) dollars, which defendant refused to pay and still refuses to pay.

3. Wherefore, plaintiff prays judgment against the defendant on the tenth count for the sum of forty-four & 11/100 ($44.11) dollars with interest thereon from August 15, 1918, until the date of judgment herein.

[fol. 30-14] Count XI

1. For its eleventh count against the defendant, the plaintiff adopts and reiterates as is recited heretofore all the allegations and matters contained in paragraphs 1, 2 and 3 of Count I and paragraph 2 of Count VI of this petition and further states:

2. That at the said rates fixed by the Public Service Commission, the Kansas City Light & Power Company furnished to defendant for heating the buildings set out in paragraph 3 of Count VI of this petition, from the 1st day of August, 1918, to the 31st day of August, 1918, steam for heating of the value, according to said rates, of ninety-six & 42/100 ($96.42) dollars; that the delinquent date for the payment of said bill was September 15, 1918, said bill having been duly rendered to the defendant by the Kansas City Light & Power Company on or before September 5, 1918; that on September 13, 1918, the defendant paid on account of said bill the sum of fifty & 66/100 ($50.66) dollars, leaving a balance due and unpaid upon said bill of forty-five & 76/100 ($45.76) dollars, which defendant refused to pay and still refuses to pay.

3. Wherefore, plaintiff prays judgment against the defendant on the eleventh count for the sum of forty-five & 76/100 ($45.76) dollars, with interest thereon from August 15, 1918, until the date of judgment herein.

[fol. 30-15] Answer

The answer to the second amended petition, duly filed in the Circuit Court of Jackson County, Missouri, at Kansas City, upon which this case was tried, is in words and figures, as follows:

Answer to Second Amended Petition

Now comes defendant and for its answer to plaintiff's second amended petition herein, and to each count thereof, denies each and every allegation in said petition, and each count thereof, contained.

For its further answer to said second amended petition, and to each count thereof, defendant states that whatever

heating service was furnished to defendant by plaintiff, or its predecessors, the Kansas City Light & Power Company and Kansas City Heating Company, between October 1, 1917, and September 1, 1918, was done under and by virtue of a written contract between defendant and Kansas City Heating Company, dated February 27, 1908, whereby said Heating Company undertook and agreed to furnish steam heating service to defendant for a period of five years, beginning September 1, 1908, and ending August 31, 1913, with the proviso in said contract that this defendant should have the option, by giving written notice to said Light & Power Company, its successors or assigns, on or before June 2, 1913, of extending the terms of said contract for a period of five years, and that such option was exercised by defendant and written notice, extending said contract for a period of five years, was given to said Heating Com-
[fol. 30-16] pany, by defendant, on or about May 29, 1913. Defendant further states that in said contract plaintiff's predecessor, the Kansas City Heating Company, undertook and agreed to furnish heating service to defendant at the following rates, to-wit: For the first fifty thousand (50,000) pounds of condensation per season, at sixty-five cents ($0.65) per one thousand (1000) pounds; for the second fifty thousand (50,000) pounds of condensation per season, at fifty-five ($0.55) cents per one thousand (1000) pounds, and all condensation in excess of one hundred thousand (100,000) pounds per season, at forty cents ($0.40) per one thousand (1000) pounds; bills for same to be rendered to defendant at the end of each calendar month and defendant to be allowed a discount of ten per cent (10%) of the amount of such bills if the same be paid on or before the tenth day of the month after such bills were rendered. Defendant further states that the Kansas City Heating Company did render heating service to defendant between October 1, 1917, and September 1, 1918, and for all such service defendant paid therefor promptly, according to the terms of said contract, and that plaintiff, or its predecessor, said Heating Company, has been fully paid for all heating service rendered to defendant; and defendant states that to permit plaintiff to recover any further sum from defendant for heating service, between the dates aforesaid, and to permit plaintiff to impose upon defendant the rates for steam heating service set forth in plaintiff's second amended petition herein, and particularly in Count I and Count VI

thereof, would be in violation of Section 10 of Article I of the Constitution of the United States, which provides [fol. 30-17] that no state shall pass any law impairing the obligation of contracts. And defendant further states that to permit plaintiff to recover any further sums from defendant outside of and in excess of the sums required to be paid by defendant under and by virtue of the written contract aforesaid, between defendant and said Heating Company, would be the taking of defendant's property and property rights in said contract without compensation and without due process of law, in violation of Section I of Article 14 of the amendments to the Constitution of the United States, and would be denying to defendant the equal protection of the law, in violation of Section I of Article 14 of the amendments to the Constitution of the United States.

Further answering said second amended petition, defendant denies that prior to August 1, 1917, the Public Service Commission of the State of Missouri fixed a schedule of rates for steam heat service, as set forth in Count I of the amended petition herein, and defendant denies that said last mentioned schedule of rates for steam heat service was ever approved by such Public Service Commission, or that the same was ever a legal schedule of rates, but, on the contrary, defendant states that such schedule of rates, after being filed by plaintiff herein, or its predecessor, was, upon a protest being made thereto by the City of Kansas City and heat consumers, after a hearing thereon, as provided by law, before said Commission, found and declared by said Public Service Commission of Missouri to be illegal, unreasonable and excessive, and that such ruling and decision of the Commission became and was a final decision, [fol. 30-18] and conclusive upon plaintiff, and that said decision of the Commission is found and reported in Volume 5, Mo. P. S. C. Reports, pp. 664 and following.

Further answering, defendant states that the schedule of steam heating rates set forth in Count VI of the amended petition herein was fixed by the Public Service Commission without any notice to or any hearing of this defendant, and without any consideration or finding by said Commission as to the reasonableness or unreasonableness of the written contract, hereinbefore referred to, between defendant and Kansas City Heating Company, and defendant says that to make either of said above named schedule of rates applicable to this defendant, during the term of this said

written contract, or during the times set forth in the amended petition herein, would be impairing the obligations of said contract and would be denying to defendant the equal protection of the law, and the taking of defendant's property without due process of law, in violation of the provisions of the Constitution of the United States above mentioned.

Wherefore, having fully answered, defendant prays to be discharged hence with its costs.

JUDGMENT

On the issues theretofore joined, trial was had and judgment was entered by the court on the 27th day of August, 1932, the same being the sixtieth day of the May term, 1932, of said court, which said judgment is in words and figures as follows:

[fol. 30-19] "This cause coming regularly on to be heard, the parties hereto appearing by their attorneys, and the parties hereto having waived a jury herein, and submitted the issues to the court, and the court having heard and considered all of the evidence in the case, and having considered and passed upon the declarations of law requested by the defendant, and having heard the arguments of counsel, and being fully advised in the premises, finds the issues in favor of the defendant upon Counts 1, 2, 3, 4 and 5 of the second amended petition in this cause, upon which said second amended petition the issues were made up herein, and finds the issues in favor of plaintiff upon Counts 6, 7, 8, 9, 10 and 11 of said second amended petition.

Wherefore, It is ordered and adjudged by the court that the plaintiff have and recover nothing upon Counts 1, 2, 3, 4 and 5 of the second amended petition, and that judgment be, and it is hereby adjudged, for the defendant upon said Counts 1, 2, 3, 4 and 5 of said second amended petition.

It is further ordered and adjudged by the court that the plaintiff have and recover of and from the defendant as follows:

Upon Count 6 of the second amended petition the sum of $189.44 plus interest thereon to the date of this judgment in the sum of $163.36, or the total sum including principal and interest of $352.80 upon said Count 6.

Upon Count 7 of the second amended petition the sum of $180.08 plus interest thereon to the date of this judgment [fols. 30-20–30-22] in the sum of $154.39, or the total sum including principal and interest of $334.47 upon said Count 7.

Upon Count 8 of the second amended petition the sum of $83.26 plus interest thereon to the date of this judgment in the sum of $70.94, or the total sum including principal and interest of $154.20 upon said Count 8.

Upon Count 9 of the second amended petition the sum of $41.67 plus interest thereon to the date of this judgment in the sum of $35.30, or the total sum including principal and interest of $76.97 upon said Count 9.

Upon Count 10 of the second amended petition the sum of $44.11 plus interest thereon to the date of this judgment in the sum of $37.14, or the total sum including principal and interest of $81.25 upon said Count 10.

Upon Count 11 of the second amended petition the sum of $45.76 plus interest thereon to the date of this judgment in the sum of $38.33, or the total sum including principal and interest of $84.09 upon said Count 11.

That the plaintiff have interest at the rate of six per centum per annum from the date of this judgment upon the aggregate amount of $1083.78, and that plaintiff have execution for the aggregate amount of $1083.78 and interest from the date hereof, and for its costs herein."

MOTIONS FOR NEW TRIAL

The record shows that, in due and proper time, both plaintiff and defendant duly filed herein their respective Motions for a New Trial, hereinafter set out; and that both of said Motions were overruled by the Court on January 7, 1933, during the November, 1932, Term of said Court.

[fol. 30-23] APPLICATION AND AFFIDAVIT FOR APPEAL OF DEFENDANT-APPELLANT AND ORDER GRANTING APPEAL

And thereafter, to-wit: On the 7th day of January, 1933, the same being the 45th day of the November term, 1932, of said court, said term being the same term within which de-

fendant's motion for new trial was overruled, defendant's application and affidavit for appeal was filed in the Circuit Court of Jackson County, Missouri, at Kansas City, and was taken up and examined by the court and found to be in proper form; and having been seen, heard and considered by the court, was sustained and an appeal was allowed by the court to the Supreme Court of the State of Missouri. Said order appears in the records of the Circuit Court of Jackson County, Missouri, at Kansas City. The said application and affidavit for appeal is in words and figures as follows:

"Now comes defendant, Midland Realty Company, and prays the court to grant it an appeal in the above entitled cause to the Supreme Court of Missouri from the judgment rendered and entered herein upon Counts 6 to 11, inclusive, and each of them, of plaintiff's second amended petition.

Scarritt, Jones and North, Attorneys for Defendant.

STATE OF MISSOURI,
County of Jackson, ss:

Elliott H. Jones, being first duly sworn, and upon his oath states that he is the attorney and agent for the Midland Realty Company, defendant and appellant herein, and being hereto duly authorized makes this affidavit in its be- [fol. 30-24] half, and further states that such appeal is not made for vexation or delay but because affiant and said appellant believe that the said appellant is aggrieved by the judgment and decision of the court herein upon Counts 6 to 11, inclusive, of the second amended petition herein.

(Signed) Elliott H. Jones.

Subscribed and sworn to before me this 7th day of January, 1933. (Signed) Lynn G. Buford, Clerk of the Circuit Court of Jackson County, Missouri, by J. A. Shannon, Deputy. (Seal.)"

The filing mark of the clerk of the Circuit Court of Jackson County, Missouri, at Kansas City, appearing on the back of said application and affidavit for appeal is in words and figures as follows:

"Filed January 7, 1933, Lynn G. Buford, Clerk, by J. A. Shannon, Deputy."

APPLICATION AND AFFIDAVIT FOR APPEAL OF PLAINTIFF-APPELLANT AND ORDER GRANTING APPEAL

And thereafter, to-wit: on the 7th day of January, 1933, the same being the 45th day of the November term, 1932, of said court, said term being the same term within which the plaintiff's motion for new trial was overruled, the plaintiff's application and affidavit for appeal was filed in the Circuit Court of Jackson County, Missouri, at Kansas City, and was taken up and examined by the court and found to be in proper form; and having been seen, heard and considered [fol. 30-25] by the court, was sustained and an appeal was allowed by the court to the Supreme Court of the State of Missouri. Said order appears of record in the Circuit Court of Jackson County, Missouri, at Kansas City. Said application and affidavit for appeal is in words and figures as follows:

APPLICATION AND AFFIDAVIT FOR APPEAL

"STATE OF MISSOURI,
County of Jackson, ss:

The Kansas City Power & Light Company prays the court to grant to it an appeal in the above entitled cause, and for reason therefor states:

That the verdict and judgment returned and rendered herein upon Counts I to V, both inclusive, and the refusal of the court to grant to plaintiff a new trial upon said counts in this cause is oppressive, unjust and erroneous.

And Ludwick Graves, being first duly sworn, upon his oath states that he is attorney and agent for the Kansas City Power & Light Company, the above named appellant, and makes this affidavit for and in its behalf, and states that such appeal is not made for vexation or delay but because affiant believes that the appellant is aggrieved by the judgment and decision of the court upon Counts I to V, both inclusive.

(Signed) Ludwick Graves.

Subscribed and sworn to before me this 7th day of January, 1933. (Signed) Lynn G. Buford, Clerk, by J. A. Shannon. (Seal.)"

The filing mark of the clerk of the Circuit Court of Jackson County, Missouri, at Kansas City, appearing on the [fols. 30-26 & 30-27] back of said application and affidavit for appeal is in words and figures as follows:

"Filed January 7, 1933, Lynn G. Buford, Clerk, by J. A. Shannon, Deputy."

CERTIFICATE OF JUDGMENT AND ORDER GRANTING APPEALS

On the 13th day of January, 1933, both appellants filed in this court a certified copy of the record entry of the judgment appealed from, showing the date and day of the term, month and year upon which the same was rendered, together with the orders granting the appeals, as prescribed by Section 1028, R. S. Mo. 1929, and prescribed by the rules of the Supreme Court of Missouri, and of which this court will take judicial notice, said certificate evidencing the filing of the motions for new trial, orders overruling the same, the judgment and the granting of the appeals to this court.

ORDER FILING BILL OF EXCEPTIONS

Thereafter, to-wit: On the 6th day of May, 1933, the same being the 47th day of the March, 1933, term of said court, the joint bill of exceptions on behalf of plaintiff and defendant was duly and timely filed by the appellants in the office of the clerk of the Circuit Court of Jackson County, Missouri, at Kansas City, and on said day the court allowed, signed, filed and ordered the said bill of exceptions to be made a part of the record herein.

[fol. 30-28] **Joint Bill of Exceptions on Behalf of Plaintiff-Appellant and Defendant-Appellant**

OPENING STATEMENTS AND ADMISSIONS

Mr. Graves: This is a case involving the question of whether or not there are any moneys due the Kansas City Power & Light Company, as the successor of other companies, for the difference between the steam-heating rate

specified in a certain contract by and between defendant company and the predecessor companies of the Kansas City Power & Light Company and the Midland Realty Company, and the rates filed under the law with the Public Service Commission of the State of Missouri; that, briefly, is this case.

Prior to the enactment in the State of Missouri of the Public Service Commission law—correct me, now, if I make a misstatement—we had separate contracts with the different buildings in Kansas City for the supplying of steam heat, one of which was with the Midland Realty Company, which had a contract with the predecessor company of the light company, and that was extended in 1913—wasn't it?

Mr. Jones: Yes.

Mr. Graves: For an additional five years—or twelve years; the original contract was five years prior to that. This was extended before the Public Service Commission law, which carried it up until the year 1917 or 1918—1918—that contract. In 1917, the Kansas City Light & Power Company, which is a predecessor company, filed with the [fol. 30-29] Public Service Commission of the State of Missouri a general steam-heating rate, applicable to all of its customers, and that remained on file for a period of thirty days, under the law; no protest having been made under the law, it became effective. After that; upon application of a number of consumers of steam heat, that rate was attacked by direct proceeding in the Public Service Commission, and it was reduced—not down to what the contract rate was, but down to a figure less than the final rate. After that, another rate, much higher than either the contract rate or the first rate filed in 1917, was filed by the Kansas City Light & Power Company, and that rate was finally sustained by the Public Service Commission, and sustained by the Supreme Court.

Now, the question is solely—as I understand it, there are only two rates involved in this case; the third rate isn't involved in this case; it will be introduced in evidence only on the question of the reasonableness of the first rate and second rate. Mr. Jones' company, the Midland Realty Company, refused to pay the filed rate, and did pay, as we admit, on account, under the terms of their contract, up until the contract went out of existence, and then they paid the final rates after that. This suit is for the difference

between the contract rate, which they still say they are under—and we say the filed rate, and the only one; that is the sole issue as I see it.

Mr. Jones: I think that is just about the case, Your Honor. To make it a little more clear: As Mr. Graves stated, this contract was made, and the extension thereof, both, prior to the passage of the Public Service Commission Act. I don't [fol. 30-30] know that they lay particular stress on that fact, or whether it makes a great deal of difference.

Our position in the matter has been this: That the mere passage of the Public Service Commission Act establishing the Commission did not in and of itself destroy, annual or wipe out existing contracts with a public utility. Then, as Mr. Graves stated, some time later this company or its predecessor—there is no question about the succession of the companies—simply filed—sent down a rate and filed it; there was no action of the Public Service Commission thereon, in any manner or shape; it simply remained on file thirty days, without any action thereon, and they claim it went into effect, under the statute—that the rate should go in after thirty days; that there was no consideration, hearing or action taken by the Public Service Commission whatsoever.

Our position is that the merge passage of the Public Service Commission Act did not, in and of itself, wipe out any contract. We are perfectly cognizant of the law and the decisions that a contract with a public utility is subject to the police power of the state, and subject to be set aside if for the public good; but it doesn't follow that by the mere enactment of the statute there was accomplished the annulment of any contract.

Our further position is that the mere filing of a rate by a public utility, after the passage of an act, also does not serve to annul a contract. The passage of the Public Service Commission Act, as we call it, simply was a first step; it was a claim—an assertion of a claim of a right which up to that time they didn't have, because up to that time the [fol. 30-31] legislature hadn't acted to fix a rate, just a mere step empowering the state, through its proper bodies, to fix a rate; that the mere passage or filing of a rate without any hearing or action of the Public Service Commission thereon, did not set aside the contract. That affects about two-thirds or three-fourths of this case.

At that time—I might add there—I guess Mr. Graves has made that plain—that rate that was filed was attacked by the city, and upon hearing it was held to be unreasonable, and was set aside by the Commission. Then the company, a little later, filed an application for the Public Service Commission to hear the matter of and with reference to both electrical current and steam-heating rates, and to put in a rate which was reasonable. This passed through Your Honor here; if you will remember, Your Honor held this court didn't have any jurisdiction; we went to the Supreme Court on mandamus, asserting that the Circuit Court of Jackson County did have jurisdiction, and it went up before Judge Hall, at Independence, who set aside this last action of the Public Service Commission; they appealed it to the Supreme Court. That involves between one-third and one-quarter of the counts sued on.

This company, the Midland Realty Company, was not at any time a party to any of those actions; its contract was never brought into question directly; so we say that, while the state may have had the power on a hearing to annul their contract, it never has done it; so the company paid, in accordance with the contract, up to the full term of the contract, and continued to pay according to schedule after the time of the contract; they now have brought suit for the difference between what they have been paid, as they [fols. 30-32 & 30-33] concede, according to the contract rate and that charged, first under the schedule which was merely filed by the company, without any action of the Public Service Commission, which filed schedule was later set aside; and later, under the rate put into effect by the Public Service Commission at a hearing. I know, of course, I am up against a very much different proposition under the latter part of the petition than I am the first; but even then I am still working under the contract.

[fol. 30-34] PLAINTIFF'S TESTIMONY

Whereupon, the plaintiff, to sustain the issues in his behalf, offered testimony, oral and documentary, and made admissions as follows, to-wit:

Mr. Graves: Mr. Jones and I, I think, have agreed that this is to be tried on the second amended petition; that the

first, second and third paragraphs of Count 1, which also apply to each and every other count in the petition, are admitted. These allegations are that the Kansas City Power & Light Company says it is a corporation, and that it is engaged in the production and distribution of electricity to Kansas City—a public utility under the law and subject to the jurisdiction of the Public Service Commission; that it is the successor of the Kansas City Light & Power Company and the Kansas City Heating Company, and is the owner and assignee of all choses in action, rights and privileges, property and contracts of those two predecessor companies; the second paragraph alleges the Light & Power Company's corporate existence as being the same; and the third paragraph, that the defendant, which is the Midland Realty Company, is a corporation. Can all three of those be admitted?

Mr. Jones: Yes; the defendant will admit all the facts in Counts 1, 2 and 3 of the second amended petition.

[fol. 30-35] Mr. Graves: Which is applicable to all counts?

Mr. Jones: Yes, sir.

Mr. Graves: If Your Honor please, I would like to introduce some general evidence that is applicable to all three counts; I will offer in evidence as to all counts a certified copy, certified by the secretary of the Public Service Commission of the State of Missouri, of the rate filed June 19, 1917, effective August 1st, 1917.

Mr. Jones: The petition shows June 28th.

Mr. Graves: Well, it is effective August 1st; it should be prior to August 1st, 1917, which shows that it remained in effect until cancelled March 1, 1918, and also the rate—now, I will state for the record that this first rate is applicable to Counts 1, 2, 3, 4 and 5; there is also here in this certified copy—the date of issue was February 11, 1918, and it was filed, effective March 1, 1918; this was filed as per order of the Commission, after a hearing upon the direct attack on the first rate effective August 1, 1917; those are the two rates that are involved.

The Court: That first rate, as I understand, was disapproved by the Commission?

Mr. Graves: Later; no; it was filed and lay there for more than thirty days, and under the statute it became effective, and after the effective date certain heating customers of the Kansas City Light & Power Company attacked it by direct attack before the Commission.

Mr. Jones: This first schedule of rates becoming effective August 1, 1917, was merely filed by the company on June 17th, and under your claim merely went into effect by [fols. 30-36–30-42] reason of the fact that it remained on file without protest or hearing, or anything, for more than thirty days.

Mr. Graves: Yes—or over the period required by the statute, which is thirty days. The Public Service Commission, of its own motion, didn't set aside this filed rate of August 1, 1917, and no one protested the filing of that rate.

Mr. Jones: And the Public Service Commission didn't make any direct order with respect to it?

Mr. Graves: That is correct. I want this marked—and all of these rates are certified together, under date of the 26th of January, 1929; and I will have it identified as plaintiff's Exhibit 1, and I offer the same in evidence, together with the certificate.

(Which said instrument handed to the reporter was marked for identification as "Plaintiff's Exhibit 1, EFM," which being offered in evidence, is in words and figures as follows:)

RECITAL AS TO PLAINTIFF'S EXHIBIT 1

Said schedules are not here set forth since the substance of the first mentioned schedule, filed June 19, 1917, is correctly set forth in Count I of the petition, ante, and the substance of the second schedule mentioned, dated February 11, 1918, effective March 1, 1918, is correctly set forth in Count VI of the petition herein, ante.

[fol. 30-43] OFFERS IN EVIDENCE

Mr. Graves: I introduce in evidence consolidated Case Nos. 299,601 and 603, of the Public Service Commission, together with the order or orders and findings made, appearing at page 20 and following pages—it is pages 20 to 124, inclusive, of Volume 5 of the Official Reports, Public Service Commission Reports, Volume 5.

Mr. Graves: I now offer and introduce in evidence Case No. 1353, decided February 11, 1918, entitled "In the Mat-

ter of the Complaint of Kansas City v. Kansas City Light & Power Company, Mary B. Case, et al., Interveners," [fols. 30-44 & 30-45] decided February 11, 1918, and all orders, findings and reports contained therein, which appears at pages 664, same volume, to 683, inclusive, Volume 5, Public Service Commission Reports of Missouri.

Mr. Graves: I introduce in evidence Case No. 1615, of the Public Service Commission of the State of Missouri, and its decision thereon, entitled "In the Matter of Application of Kansas City Light & Power Company for increase in rates for electrical current and steam heat, City of Kansas City, Missouri, Albert Marty Estate et al., Mary B. Case et al., and Cement Company, Interveners," which was decided August 13, 1918, and appears on pages 223 to 301, inclusive, of Volume 8, Public Service Commission Reports of Missouri—the official reports; they may be received in evidence, Your Honor?

The Court: Yes.

AGREEMENT AS TO CERTAIN EVIDENCE

It is agreed that the three above mentioned decisions and findings of said Public Service Commission may be considered in evidence to the same effect as if fully set forth in the Record, by mere reference to the books and pages, as above stated, of the Public Service Commission Reports of Missouri, where said decisions are found reported.

[fol. 30-46] COLLOQUY

Mr. Graves: Now, I am ready to make formal proof of the amounts, and I intend to give full credit to everything paid under your contracts.

Mr. Jones: I don't think that is necessary—we will admit those.

Mr. Graves: We can admit the figures; I have it in exhibit form.

[fol. 30-47] Mr. Jones: I don't think we will need it; they agree with the petition, don't they?

Mr. Graves: Yes, except on one point, where I missed a day, this is correct; there is the statement of your account.

Mr. Jones: Well, change your petition by interlineation and we will agree that the amounts stated in the second amended petition, which we paid, are exactly what we should have paid under the contract.

Mr. Graves: That is correct.

Mr. Jones: And that the amounts brought out in each count are the correct difference between the schedule rates as filed and the contract rates.

[fol. 30-48] Whereupon, the plaintiff rested its case.

[fol. 30-49] DEFENDANT'S TESTIMONY

Whereupon, the defendant, to sustain the issues in his behalf, offered testimony, oral and documentary, and made admissions as follows, to-wit:

Mr. Jones: Do you want me to put in that contract?

Mr. Graves: You just put it in; if you have it, we will admit it.

Mr. Jones: The defendant offers in evidence contract for steam heating rates referred to, dated February 27, 1908, between the Kansas City Heating Company and this defendant, Midland Realty Company as Defendant's Exhibit 1.

(Which said instrument handed to the reporter was marked for identification as "Defendant's Exhibit 1, EFM," which being offered in evidence, is in words and figures as follows:)

DEFENDANT'S EXHIBIT 1, EFM

"Steam Heat Agreement

Agreement entered into this 27th day of Feb. 1908 between the Kansas City Heating Company, hereinafter called the Company and the Midland Realty Company, hereinafter called the Consumer, both being corporations of Kansas City, Jackson County, Missouri.

Witnesseth:

That Whereas the Company is engaged in the business in Kansas City, Missouri, of manufacturing steam for the purpose of heating the buildings in certain localities and

Consumer now has, owns or controls two buildings, one [fol. 30-50] located on S. E. Corner 10th and McGee Streets, (which stands in the name of Laura B. Minor), and one on the S. W. corner of 10th and Oak Streets, and has designed and contemplates erecting two other buildings, one to be located on N. W. corner of 10th and McGee Streets and one to be located at 1008 Oak St., and in consideration of the Company extending its steam service pipe up to and from three (3) to five (5) feet inside of the ou-side wall of each of said buildings, ready to connect with the steam pipes of the Consumers therein, the Consumer agrees to use the Company's steam for heating said buildings (unless said buildings should pass out of their possession or control by bona fide sale or be destroyed by fire) for and during a period of five (5) years beginning 1st day of Sept. 1908 and ending 31st day of Aug. 1913.

The Consumer agrees to install and maintain sufficient radiation to heat the above mentioned buildings to 70 degrees Fahrenheit inside with the outside temperature ten degrees below zero, Fahrenheit, and must have piping of sufficient capacity to fill all radiation under these conditions with steam at a pressure of one pound per square inch at entrance valve and further agrees to equip all of the above mentioned buildings with approved steam traps of sufficient capacity to properly drain condensation from the heating systems of the buildings without any loss of steam and to equip all radiators with automatic air valves of a make satisfactory to the Company and to equip each building with an economy coil, surface of which shall equal one-fifth (1/5) of the entire radiating surface of the building.

[fol. 30-51] The Consumer agrees while the Company performs its part of this agreement to take and use the steam of the Company exclusively for the purpose of heating said buildings during the term aforesaid (except the building at the S. E. Corner of 10th and McGee Streets, as to which building the Consumer or Consumer's tenants have the option to take steam or not just as they choose on the terms stated herein) and agree to pay for all steam used by it according to the number of pounds of condensation per heating season, that is to say, for the first fifty thousand (50,000) pounds of condensation per season at sixty-five (65) cents per one thousand (1,000) pounds; for

the second fifty thousand (50,000) pounds of condensation per season at fifty-five (55) cents per one thousand (1,000) pounds and all condensation in excess of one hundred thousand (100,000) pounds per season at forty (40) cents per one thousand (1,000) pounds, it being understood that the above rates apply to the total amount of steam used in all said buildings the same as if there were only one meter, instead of separate meters in each building, though seperate monthly bills are to be rendered on each meter, as contemplated in this contract. The amount of condensation shall be determined by the meter registration. Correct statement of account shall be rendered by the Company to the Consumer at the end of each calendar month and it is expressly agreed that if said bills are paid by the Consumer on or before the tenth (10) day after such bills are rendered, they shall be allowed a discount of ten (10) per cent of the amount of such bills.

[fol. 30-52] The Company expressly agrees that the cost of heating said buildings shall not during any heating season exceed twenty-four (24) cents per square foot of radiating surface.

The meter or meters used in these buildings for the measuring of the condensed steam shall be of the standard type manufactured by the American District Steam Co. It is expressly agreed that the Consumer shall, during the term of this contract, be entitled to have and use such condensed steam coming from the heating mains as the Consumer may desire, but in case Consumer does use such condensation, it shall be taken from the outlet pipe of the meters and so taken as not to interfere with the operation or action of any of the apparatus furnished by the Company or interfere with the action of the heating System.

The Company agrees to use reasonable care and skill to supply steam according to the provisions of this agreement, it being understood that the Consumer assumes any risk of interruption of its steam supply due to accidents or other circumstances beyond the control of the Company. The Company has the right to remove the meters and all other material and appliances installed at its expense and to discontinue the supply of steam, upon first giving five (5) days notice in writing of an intention so to do, whenever any bills for said service are in arrears or for mis-

representation in relation to consumption of steam, or upon the violation by the Consumer of any of the terms and conditions of this contract, provided that within such five (5) days any reasonable losses sustained by the Company [fol. 30-53] due to above cause or causes have not been made good to the Company by Consumer.

All service pipes, valves and meters placed in the said buildings by the Company shall be and remain the property of the said Company and it shall have the right at all times through its duly authorized agents to have access thereto for the purpose of inspecting or repairing the same and the said Company shall also have the right at reasonable times to inspect the apparatus throughout the said period.

It is agreed that from the 1st of November until the 1st of May succeeding there shall be a continuous supply of steam for the said buildings with a pressure of about one pound per square inch at service valve, and that during October and May such steam shall be furnished as weather conditions demand, it being understood that during these two months the steam heat service will be the same as that supplied to the various office buildings on said Company's service mains.

It is understood that the heating season, as that phrase is used in this contract, is the period in which steam is to be furnished by the Company, said period beginning October 1st and ending May 31st of the succeeding year, it being understood that the Company is not required to supply steam during that part of the year not included in the heating season.

It is expressly agreed Consumer shall have the option by giving written notice to the Company, its successors, or assigns, on or before June 2nd 1913, of extending the terms of this contract for a period of five (5) years, but should the [fol. 30-54] Consumer desire to terminate this contract at the expiration of the fifth (5) year, notice in writing must be given the Company ninety (90) days prior to the expiration thereof, and the Consumer shall thereby have the option to purchase all pipes, valves, and fittings installed by the Company under this contract. The purchase price to be the total cost of all labor and material used in installing said valves, pipes and fittings and to pay the Company net cost for labor for disconnecting said pipes, valves

and fittings from the Company's service mains, said bills to be paid upon presentation.

The Consumer agrees to maintain the heating systems steam tight so that there shall be no loss to the Company either of steam or hot water and to use all reasonable diligence in maintaining his heating systems in first class shape and to see that only enough steam is used to properly heating the buildings. It is further agreed that all pipes and fittings carrying steam not covered with standard pipe covering shall be counted as radiating surface.

It is further agreed that in consideration of the Company's service pipe being run to the property line free of cost to the Consumer that the Company shall have the right and privilege to extend said service pipe through the basement of Consumer's buildings as directed by Consumer to adjacent buildings for the purpose of supply- same with heat, it being understood that the Company will repair all damages to the building walls caused by its service pipes or service pipe extensions.

The Company agrees to excavate the streets for installa- [fol. 30-55] tion of pipes, etc., necessary to carry out the terms of this contract under city permits taken out in the name of William E. Minor, but it is expressly agreed that all pipes, etc., so installed are to be and remain the property of the Company, as long as Consumer uses steam and unless consumer purchases said pipes under option as proided for elsewhere in this contract.

The Company agrees to furnish and set the inside service valve to the wall of building, the necessary traps and the necessary meters; all other fittings, pipes and labor required inside the building to be done by Consumer.

All prior agreements are merged in this instrument and no modification hereto is binding unless made in writing.

This Contract although signed is subject to the approval of the General Manager of the Company and shall not be binding on the Company until endorsed by his approval.

It is finally agreed that all the terms and stipulations heretofore made and agreed by said Consumer and said Company relative to this heating service are merged in this contract and that no previous or contemporaneous representations or agreements made by the Company's officers or agents shall be binding on the Company, except to the extent herein contained.

This contract shall bind the parties hereto their successors and legal representatives.

In Witness Whereof, The Said Company, and the said Consumer have hereunto caused their names to be signed by their duly authorized officers and their corporate seals [fols. 30-56 & 30-57] to be hereunto affixed, the day and the year first above written.

Executed in duplicate, this 27th day of Feb. 1908.

Kansas City Heating Company, (Signed) by C. F. Farley. (Seal.)

Midland Realty Co., Consumer, per —— ——, (Signed) by William E. Minor Pres. (Seal.)

Approved Feb. 27, 1908, by (Signed) R. E. Richardson, General Manager."

COLLOQUY

Mr. Jones: Now, that contract provides—it runs for five years, with an option or right to the defendant, Midland Realty Company, to have an extension of five years, upon giving notice. Mr. Graves, will you concede that that option was exercised and the contract was extended for five additional years?

Mr. Graves: Yes, sir.

Mr. Jones: Up until August 31, 1918; I think you offered in evidence——

Mr. Graves: I offered in evidence 5 P. S. C. 664—yes, Case 1353, I offered that.

Mr. Jones: Now, Mr. Graves, you are conceding—the plaintiff and defendant, or the plaintiff and defendant's predecessors operated under and steam heat was furnished to the defendant under and by virtue of that contract, up to August 1st, 1917?

Mr. Graves: That's correct.

Mr. Jones: That's all, Your Honor.

[fols. 30-58–30-60] TESTIMONY IN REBUTTAL

Mr. Graves: Plaintiff now offers in evidence the Public Service Commission Act, passed in 1913, as shown in the Laws of Missouri, 1913, beginning with page 556 and end-

ing at page 651, showing the approval of that Act by the Governor, March 17, 1913; and Section 140, particularly, which was the emergency clause declaring the Act (Section 140) an emergency:

Mr. Jones: The court will take judicial notice of that.

The Court: Yes.

[fol. 30-61] Whereupon, the plaintiff rested its case.

And the foregoing was all the evidence offered and introduced at the trial of this cause.

DECLARATIONS OF LAW REQUESTED BY DEFENDANT-APPELLANT

Whereupon, at the close of all the evidence, the defendant requested the court to make the following declarations of law:

"1

The court declares the law to be that, under the pleadings and the evidence, the finding and judgment of the court must be in favor of defendant on counts one to five, inclusive, of plaintiff's petition."

(Given.)

"6

The court declares the law to be that the finding of fact by the Public Service Commission that the schedule of heat rates, plaintiff's Exhibit '1,' which named August 1, 1917, as its effective date, was unreasonable and unlawful, by the decision reported in 5 Mo. P. S. C. 664-683, operates to deny to plaintiff the right asserted in counts one to five, inclusive, of its petition, to recover from defendant the difference between what defendant paid, according to its contract, and what the charges for heating service to defendant would amount to, according to plaintiff's said filed schedule."

(Given.)

[fol. 30-62]

"7

The court declares the law to be that the filing by Kansas City Heating Company of its schedule of rates, plaintiff's Exhibit '1,' effective August 1, 1917, had no greater effect,

if any, than to make such schedule prima facie reasonable and lawful, and that the finding of fact by the Public Service Commission, upon a hearing, that such schedule was unjust and unreasonable, was a conclusive determination of such fact, as respects the time between August 1, 1917, and March 1, 1918, and that such finding (5 Mo. P. S. C. 664) operated to destroy the prima facie reasonableness and legality of said schedule when filed, if any such it ever had."

(Given.)

"8

The court declares the law to be that, assuming that Kansas City Heating Company had the right to file its schedule, designated as effective August 1, 1917, and to thereafter charge for its service according to said schedule, if just and reasonable, nevertheless said company was bound, at its peril, to take care and see that its rates, named in such schedule, were actually just and reasonable, for the law prescribed that 'every unjust or unreasonable charge is prohibited.' So, if the Public Service Commission, on a hearing, duly made a finding of fact that the rates named in said schedule were 'unjust and unreasonable,' said schedule of rates was not a lawful one, and plaintiff is not entitled to recover anything thereunder from defendant in this suit."

(Given.)

[fol. 30-63] "11

The court declares that there is no evidence that there ever was any hearing before the Public Service Commission or other tribunal since the *the* enactment of the Public Service Commission Act of Missouri as to whether or not defendant's contract, here in question, was or continued to be in force and effect, or as to whether or not the rates named in said contract were just and reasonable for the service rendered or to be rendered to the defendant herein by Kansas City Heating Company during the period from August 1, 1917, to March 1, 1918, and that there is no evidence that there was ever any express finding on such questions by the Public Service Commission or other tribunal affecting said period of time. Therefore, the court declares

the law to be that to permit plaintiff to impose upon and collect from defendant for steam heating service, as demanded in counts one to five, inclusive, of plaintiff's petition herein, would be in violation of Section 10, Article 1, of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts. The court further declares the law to be that to permit plaintiff to recover as prayed in counts one to five, inclusive, of its petition, notwithstanding defendant's contract in evidence, would be the taking of defendant's property rights in said contract without due process of law, in violation of Section 1, Article 14, of the amendments to the Constitution of the United States."

(Given.)

[fol. 30-64] "13

The court declares the law to be that if defendant's contract, here in question and in evidence, was in force and effect from August 1, 1917, to March 1, 1918, then plaintiff cannot recover on counts one to five, inclusive, of its petition; and that the burden is on plaintiff to show that said contract was not then in full force and effect."

(Given.)

"14

The court declares the law to be that if defendant's contract here in question and in evidence, was in force and effect from March 1, 1918, to August 31, 1918, then plaintiff cannot recover on counts six to eleven, inclusive, of its petition; and that the burden is on plaintiff to show that said contract was not then in full force and effect."

(Given.)

Which said declarations of law numbered "1," "6," "7," "8," "11," "13" and "14," and each of them, the court marked "Given"; to which ruling and action of the court in giving said declarations of law numbered "1," "6," "7," "8," "11," "13" and "14," and each of them, the plaintiff at the time duly excepted and still excepts.

The defendant also requested the court to give the following declarations of law:

"2

The court declares the law to be that, under the pleadings and the evidence, the finding and judgment of the court [fol. 30-65] must be in favor of defendant on counts six to eleven, inclusive, of plaintiff's petition."

(Refused.)

"4

The court declares the law to be that Section 87, paragraph 4, Article V (Laws 1913, p. 621), of the Missouri Public Service Commission Act was applicable in 1917 to Kansas City Heating Company, and that such provision of the act operated to keep in force and effect defendant's contract, in evidence, during the period involved in counts one to five, inclusive, of plaintiff's petition herein."

(Refused.)

"5

The court declares the law to be that Section 87, paragraph 4, Article V (Laws 1913, p. 621), of the Public Service Commission Act, was applicable in 1918 to Kansas City Heating Company, and that such provision of the act operated to keep in force and effect defendant's contract, in question, during the period involved in counts six to eleven, inclusive, of plaintiff's petition herein."

(Refused.)

"9

The defendant requests, as to each count, respectively and separately, of the petition herein, that the court declare the law to be that to permit plaintiff to recover, as prayed in its petition herein, would be in violation of Sec- [fol. 30-66] tion 10, Article 1, of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts."

(Refused.)

"10

The defendant requests, as to each count, respectively and separately, of the petition herein, that the court declare

the law to be that to permit plaintiff to recover, as prayed in its petition herein, would be the taking of defendant's property rights in its contract, here in question and in evidence, without due process of law, in violation of Section 1, Article 14, of the amendments to the Constitution of the United States."

(Refused.)

"12

Defendant asks, separately, that the court make the same findings and declarations of law, as stated in the previous request No. 11, with respect to counts 6 to 11, inclusive. of plaintiff's petition, and the period of time concerned therein, namely, March 1, 1918, to August 31, 1918."

(Refused.)

Which said declarations of law numbered "2," "4," "5," "9," "10" and "12" the court refused; to which ruling and action of the court in refusing to give said declarations of law numbered "2," "4," "5," "9," "10" and "12," and each of them, the defendant at the time duly excepted and still excepts.

[fol. 30-67] The defendant also requested the court to give the following declarations of law:

"3

The court declares the law to be that if the court finds, from the evidence, that plaintiff's predecessor company, Kansas City Heating Company, merely 'filed' in the office of the Public Service Commission its schedule of heating rates, plaintiff's Exhibit '1' in evidence, wherein August 1, 1917, is named as its effective date, and that the Commission held no hearing and made no order thereon, prior to March 1, 1918, then that schedule did not have the effect of abrogating defendant's contract, in evidence, for heating rates, and does not justify plaintiff in demanding, in counts one to five, inclusive, of its petition, any charges for heating service in excess of the rates named in defendant's said contract, by virtue of said filed schedule."

Which said declaration of law number "3" as requested by the defendant, the court refused to give; to which action and ruling of the court in refusing to give said declaration

"3" as requested by the defendant, the defendant then and there at the time duly excepted and still excepts.

Th court, of its own motion, modified said declaration of law "3" as requested by the defendant and gave said declaration of law "3" in its changed and modified form as follows:

[fol. 30-68] "3

The court declares the law to be that if the court finds, from the evidence, that plaintiff's predecessor company, Kansas City Heating Company, merely 'filed' in the office of the Public Service Commission its schedule of heating rates, plaintiff's Exhibit '1' in evidence, wherein August 1, 1917, is named as its effective date, and that the Commission held no hearing and made no order thereon, prior to March 1, 1918, then that schedule, if unreasonable, did not have the effect of abrogating defendant's contract, in evidence, for heating rates, and does not justify plaintiff in demanding in counts one to five, inclusive, of its petition, any charges for heating service in excess of the rates named in defendant's said contract, by virtue of said filed schedule."

(Modified.)

To which ruling and action of the court in modifying said declaration of law "3," as requested by the defendant, and giving said declaration of law "3" so modified, the defendant at the time duly excepted and still excepts; and to the giving of the said modified declaration of law "3" the plaintiff at the time duly excepted and still excepts.

VERDICT AND JUDGMENT

Whereupon, and on said 27th day of August, 1932, the court then and there entered judgment herein, which, omitting caption, is in words and figures as follows, to-wit:

[fol. 30-69] (Said judgment has hereinbefore been set out as a part of the record proper and reference is made thereto.)

Motion for New Trial of Plaintiff-Appellant

On the 27th day of August, 1932, the same being the 60th day of the May Term, 1932, of said court, the same being the same term within which the judgment was entered, within four days after rendition of verdict and judgment herein, the plaintiff-appellant filed its motion for new trial in words and figures as follows, to-wit:

"Comes now the above named plaintiff and moves the court to set aside the findings and judgment herein, and to grant to it a new trial herein, and for reasons therefor states:

I

The court erred in finding the facts and issues herein as stated by the court in favor of the defendant and against the plaintiff upon counts 1, 2, 3, 4 and 5 of the second amended petition herein, such findings being unsupported by the evidence, contrary to the evidence and to the greater weight thereof, and contrary to the law governing and controlling the issues herein between plaintiff and defendant.

II

The court erred in rendering a judgment for the defendant in this action upon counts 1, 2, 3, 4 and 5 of the second amended petition herein, the same being contrary [fol. 30-70]' to the evidence herein and to the greater weight thereof, and the defendant was not entitled under the law, and under the law and facts, to a judgment upon said counts 1, 2, 3, 4 and 5 of the second amended petition herein.

III

The court erred in not finding the facts and issues in favor of the plaintiff upon counts 1, 2, 3, 4 and 5 of the second amended petition herein, and in failing to render judgment in favor of the plaintiff and against the defendant upon counts 1, 2, 3, 4 and 5 of the second amended petition herein.

IV

The court erred in giving declarations of law Nos. 1, 6, 7, 8, 11, 13 and 14 as asked by the defendant, and declara-

tion of law No. 3 as asked by the defendant and modified by the court, all of said declarations of law being contrary to the facts herein, contrary to the law governing this case, and contrary to the facts and the law governing this case.

And defendant asks the judgment of the court."

MOTION FOR NEW TRIAL OF DEFENDANT-APPELLANT

On the 31st day of August, 1932, in vacation, within four days after the rendition of the verdict and judgment herein, the defendant-appellant filed its motion for new trial, in words and figures as follows, to-wit:

[fol. 30-71] "Now comes defendant and moves the court to set aside the finding and verdict herein upon counts 6, 7, 8, 9, 10 and 11 of the second amended petition herein, and to grant defendant a new trial upon said counts, and each of them, for the following reasons:

(1) Because the court erred in finding the facts and issues in favor of the plaintiff and against defendant, upon counts 6, 7, 8, 9, 10 and 11 of the second amended petition herein, such findings being unsupported by and contrary to the evidence, and contrary to the greater weight of the evidence, and being contrary to the law governing and controlling the issues herein on said counts, and each of them.

(2) The court erred in rendering a judgment for plaintiff against defendant on counts 6, 7, 8, 9, 10 and 11 of the second amended petition herein, and each of them, because the same is unsupported by and contrary to the evidence and is contrary to the law applicable to the issues upon said counts, and each of them.

(3) Because the court erred in refusing and failing to give each of the declarations of law asked by the defendant, but by the court refused, and particularly erred in refusing to give declarations of law numbered "2," "4," "5," "9," "10" and "12" asked by the defendant.

(4) Because the court erred in its judgment herein in assessing all of the costs of this case against the defendant.

Wherefore, defendant prays the judgment of the court herein."

[fols. 30-72–30-74] MOTIONS FOR NEW TRIAL OF APPELLANTS OVERRULED

And thereafter, on the 7th day of January, 1933, the same being the 45th day of the November term, 1932, of said court, the motion for new trial of plaintiff-appellant and the motion for new trial of defendant-appellant came on to be heard before the court, the parties being present by attorneys, and the court, having heard arguments of counsel and being fully advised in the premises, upon due consideration, overruled both said motions for new trial. The appellants then and there at the time duly excepted and still except.

[fol. 30-75] ORDER ALLOWING BILL OF EXCEPTIONS

And, thereafter, on the 6th day of May, 1933, the same being the 47th day of the March, 1933, term of said court, the bill of exceptions was in time filed by the appellants in the office of the clerk of the Circuit Court of Jackson County, Missouri, at Kansas City, and on said day the court allowed, signed, sealed and ordered the said bill of exceptions to be made a part of the record herein.

The signature of the judge signing and allowing said bill of exceptions was as follows:

"T. J. Seehorn, Judge of Division No. 3 of the Circuit Court of Jackson County, Missouri, at Kansas City."

And the filing mark of the clerk of the Circuit Court of Jackson County, Missouri, at Kansas City, appearing on the back of said bill of exceptions is as follows:

[fol. 30-76] "Filed May 6, 1933, Lynn G. Buford, Clerk By J. A. Shannon, Deputy Clerk."

A fair abstract of the record, including the record proper and bill of exceptions.

Johnson, Lucas, Landon, Graves & Fane, Attorneys for Plaintiff-Appellant. Scarritt, Jones & North, Attorneys for Defendant-Appellant.

[fol. 31] IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER APPROVING APPEAL BOND—July 7, 1936

Comes now the defendant-appellant, by attorney, and presents to the Court its appeal bond in the sum of Seven Thousand Dollars, which said bond has been duly approved by counsel for plaintiff-appellant. It is therefore ordered that said bond be, and the same is hereby approved and ordered filed.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 32] SUPREME COURT OF THE UNITED STATES

STATEMENT OF THE POINTS ON WHICH APPELLANT INTENDS TO RELY, AND OF THE PARTS OF THE RECORD WHICH IT THINKS NECESSARY FOR THE CONSIDERATION THEREOF—Filed July 31, 1936

(1) By virtue of paragraph 12 of Section 5190, Revised Statutes of Missouri, 1929, Vol. I, page 1448, appellee, a public utility corporation, filed with the Public Service Commission a schedule of rates, for its steam heating service, for its customers, generally, on June 19, 1917. No hearing, finding or order whatsoever was had or made by the Commission with respect to said schedule. There was then in force a contract between Appellant and Appellee for steam heating service, which was entered into prior to the enactment of the Public Service Commission Law of Missouri (Chapter 33, Revised Statutes Missouri 1929).

That contract was fully performed by both parties throughout its term. Appellant has contended and still contends that to so construe and apply said statute to the effect that it served, upon the mere filing of a schedule of [fol. 33] rates, for its heating customers, generally, by Appellee, to abrogate and make nugatory Appellant's said contract, renders said statute to be repugnant to and violative of Section 10 of Article 1 of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts, and repugnant to and violative of the Fourteenth Amendment to said Con-

stitution, which prohibits the taking of one's property without due process of law.

This point affects the first five counts of Appellee's petition herein.

(2) By virtue of paragraph 5 of Section 5190, Revised Statutes of Missouri, 1929, the Public Service Commission promulgated a schedule of rates for Appellee's heating customers, generally, effective March 1, 1918. At that time the Commission did not consider or make any finding or order with respect to Appellant's said heating contract. Thereafter Appellee continued to render heating service to Appellant throughout the term of said contract, and Appellant continued to and did pay for the same, in accordance with said contract.

About two years after said contract had been fully performed and rights thereunder had become vested, Appellee brought this suit against Appellant. By the first five counts of its petition Appellee seeks to recover the difference between what Appellant paid, according to contract, and what it contends that Appellant should have paid, for heating service from October 1, 1917 to March 1, 1918, according to the schedule of rates, which was merely filed, as aforesaid. By the last six counts of its petition Appellee seeks to recover the difference between what Appellant paid, according to said contract, for heating service from March 1, 1918 to August 31, 1918, and what Appellee claims that Appellant should have paid according to said schedule [fol. 34] of rates promulgated by the Commission, effective March 1, 1918.

As affecting the last six counts of the petition herein, Appellant has contended and still contends that to so construe and apply the said statute of Missouri to the effect that it served, by the mere promulgation of a schedule of rates for Appellee's heating customers, generally, to abrogate and make nugatory Appellant's said contract, which was fully performed, without any hearing, finding or order having been had or made by the Commission with respect thereto, renders said statute to be repugnant to and violative of Section 10 of Article 1 of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts, and repugnant to and violative of the Fourteenth Amendment to said Constitution, which

prohibits the taking of one's property without due process of law.

The decision of the Supreme Court of Missouri was against the contentions of Appellant and in favor of the validity of said statutes, so construed and applied. The amount involved herein being less than $7,500.00 the Supreme Court of Missouri acquired and entertained jurisdiction of this case solely by reason of the questions aforesaid arising under the Constitution of the United States.

The Record

Appellant considers that the whole of the record, as filed herein, is necessary for the consideration of the points on which it intends to rely. The clerk will, therefore, please cause to be printed the whole record, as filed, omitting only captions on papers filed, and filing marks thereon, unless the dates of filing are important.

Respectfully submitted, Elliott H. Jones, William C. Scarritt, Counsel for Appellant.

[fol. 35] Acknowledgment of Service of Certain Papers

The undersigned, counsel for appellee, acknowledge service of copies of the following papers:

(1) Motion of appellant for leave to file supplemental statement as to jurisdiction;

(2) Supplemental statement as to jurisdiction;

(3) Statement of points intended to be relied on, upon the appeal, and of the parts of the record necessary for the consideration of the same.

Ludwick Graves, Irvin Fane, Counsel for Appellee.

July 29, 1936.

[fol. 36] [File endorsement omitted.]

Endorsed on cover: Enter Elliott H. Jones. File No. 40,757. Missouri Supreme Court. Term No. 217. Midland Realty Company, appellant, vs. Kansas City Power & Light Company. Filed July 22, 1936. Term No. 217, O. T., 1936.